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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9741.

THE EAST OHIO GAS COMPANY, *Petitioner,*

STATE OF OHIO,
THE PUBLIC UTILITIES COMMISSION OF OHIO,
~~*Intervening*~~ *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petition for Review of Order of the Federal Power Commission.

JOINT APPENDIX.

A Petition for Review of Order of the Federal Power Commission.

To The Honorable The Judges of the United States Court of Appeals for the District of Columbia:

Petitioner, The East Ohio Gas Company (hereinafter sometimes called "East Ohio"), being aggrieved by an order of respondent, the Federal Power Commission (hereinafter sometimes called the "Commission"), made in pro-

ceedings under the Natural Gas Act to which petitioner was a party, hereby files in this Court its written petition to review and set aside said order pursuant to Section 19(b) of said Act.

Petitioner is an Ohio corporation engaged in the local distribution of natural gas solely within Ohio. Respondent is a commission created and established by act of Congress (41 Stat. at L. 1063 (1920) as amended, 16 U. S. C. Sec. 792). By the Natural Gas Act (52 Stat. at L. 821 (1938), 15 U. S. C. Sec. 717) the Commission is vested with certain authorities over persons engaged in the interstate transportation or interstate sale of natural gas.

B East Ohio was respondent and defendant in certain proceedings before the Commission commenced in 1939 and bearing its Docket Nos. G-115, G-399, G-400 and G-401. The order of the Commission herein sought to be reviewed and set aside was issued in such proceedings November 7, 1947 as a part of the Commission's Opinion No. 158 and it incorporated and made effective on that date an order previously issued by the Commission in such proceedings dated June 25, 1946.

Said Commission order of June 25, 1946, so made effective by the order of November 7, 1947, among other things, found East Ohio to be a "natural-gas company" within the meaning of the Natural Gas Act and hence subject to the Commission's jurisdiction and (1) ordered East Ohio to comply with all previous accounting orders (Nos. 69, 69-A and 73) made by the Commission and applicable to "natural-gas companies" subject to its jurisdiction, including those relating to the determinations of original cost of property, (2) ordered East Ohio to comply with all previous orders (Nos. 63, 80, 86, 100 and 113) of the Commission requiring such "natural-gas companies" to file annual reports on forms prescribed by the Commission, and (3) ordered East Ohio within 90 days to file with the Commission the data, statements and reports required by said orders in so far as East Ohio could reasonably supply the

same within that period and to inform the Commission in writing as to when the remainder of the required data, statements and reports would be filed.

On July 22, 1946 East Ohio filed an application for a rehearing and for a stay of said order of June 25, 1946, both of which were granted on August 23, 1946, the rehearing being limited to oral argument. After the rehearing the Commission issued its said order of November 7, 1947, which dissolved the stay, changed the effective date of the order of June 25, 1946 to November 7, 1947 and otherwise reaffirmed said order.

C On December 3, 1947 East Ohio applied to the Commission pursuant to Section 19(a) of the Natural Gas Act for a rehearing and a stay of said order of November 7, 1947. The application for rehearing set forth specifically the grounds upon which East Ohio claims that the order of the Commission and the opinions and findings upon which it was based are unlawful and prejudicial to East Ohio.

On December 30, 1947, after modifying said previous orders in respects not now material, the Commission denied said application for a rehearing and stay filed December 3, 1947.

East Ohio avers that said order of November 7, 1947, as modified by the order of December 30, 1947, but including the parts of said order of June 25, 1946 incorporated and made effective thereby as above set forth, exceeds the jurisdiction of the Commission and is unlawful for each of the following reasons upon which East Ohio relies:

I.

A. The Commission erred in failing to make and give effect to the following findings of fact requested by East Ohio and shown by undisputed evidence in the record to wit:

1. East Ohio is an Ohio corporation, organized in 1910 as a merger of several other Ohio companies. Its business from the beginning and now is the direct local distribution

of natural gas to 550,000 consumers in 69 Ohio municipalities with an estimated population of more than 2,000,000, of which the principal are Cleveland, Akron, Canton, Massillon and Youngstown.

2. The total sales of East Ohio in 1945 were as follows:

	In M.c.f.
Sold to domestic consumers	46,674,457
Sold to industrial consumers	30,126,754
Field sales	627,196
Total sales	77,428,407

D All sales to domestic and industrial consumers were made through East Ohio's local distribution systems in the 69 communities served. No sales to industrial or other consumers from pipe lines outside of those communities were made. No sales of any kind of out-of-state gas or a mixture of out-of-state and Ohio gas were made to any other company for resale. Field sales in their entirety are of gas both produced and consumed in Ohio.

3. All of East Ohio's rates and all of its public utility obligations are regulated in Ohio. This local regulation of rates consists of municipal ordinances accepted by East Ohio and constituting contracts under Ohio General Code Sections 3982 and 3983 or orders of The Public Utilities Commission of Ohio made on proceedings initiated by East Ohio or on appeal from a municipal ordinance fixing an unacceptable rate (Ohio General Code Sections 614-20 *et seq.* and Sections 614-44 *et seq.*). All gas sales made by East Ohio are at rates fixed in accordance with Ohio statutes.

4. East Ohio never has and does not now transport natural gas in interstate commerce or otherwise for any other person, nor has it ever held itself out as willing to do so. No gas is moved from East Ohio's lines to points outside the state.

5. For 35 years East Ohio has been and is now completely subject to The Public Utilities Commission of Ohio in respect of all rates not agreed upon with municipalities and

in respect of all other public utility service obligations. The Public Utilities Commission of Ohio has exercised its regulatory power over rates and other East Ohio matters in no less than 258 separate proceedings during its existence. That Commission has repeatedly placed a valuation upon, and examined and determined the operating expenses of, the pipe lines running from the Ohio River to Cleveland city gate and elsewhere.

E 6. East Ohio's gas supply comes from (1) Ohio producing fields, (2) gas delivered at the Ohio-West Virginia line by the Hope Natural Gas Company, and (3) gas delivered by the Panhandle Eastern Pipe Line Company at Maumee, Ohio. Through these lines East Ohio receives gas produced in West Virginia, Louisiana, Texas, Kansas and other southwestern fields. During recent years from 70% to 85% of East Ohio's supply is out-of-state gas and the remainder is Ohio gas. All out-of-state gas delivered to East Ohio is at prices that have been fixed by regulatory orders of the respondent.

7. The total number of miles of pipe line owned and operated by East Ohio as of December 31, 1945 was as follows, using the accounting classification required by The Public Utilities Commission of Ohio:

	Miles
Distribution lines	5,490
Storage lines	672
Field lines	1,011
Transmission lines	903

Of the lines classified in the accounts as transmission lines approximately 650 miles serve the purpose of bringing out-of-state gas from points of delivery at or near the state boundary line to East Ohio's local distribution systems and for the most part without further compression. These lines serve no other purpose. If East Ohio's distribution business were terminated it would have no use whatever for these lines or any of its property. East Ohio's purchases and sales, receipts and deliveries are all in Ohio.

8. East Ohio for many years has been keeping its books of account in accordance with the Uniform System of Accounts prescribed or permitted by The Public Utilities Commission of Ohio and has filed annually reports, depreciation rates and similar accounting and other data with the Ohio Commission. The cost to East Ohio of attempting to comply with respondent's Orders Nos. 69, 69-A and 73, requiring reclassification and a statement of original cost of all of East Ohio's properties—general, distribution, transmission and production—would now be between $1,500,000 and $2,000,000.

B. The Commission erred in failing to correct its Finding (15) in said order of June 25, 1946 that East Ohio's transmission lines Nos. 1, 2, 3, 4, 5 and 6 and its Youngstown branch lines "are not, and at all times mentioned herein, were not facilities used for the * * * local distribution of natural gas," and further erred in its findings in said Opinion No. 158 "that East Ohio's 650 miles of transmission pipe lines, described herein, are not 'facilities used for' local distribution, * * *."

C. The Commission erred in not finding and holding that the transmission lines referred to in paragraph B above in their entirety are facilities used by and useful to East Ohio solely for the local distribution of natural gas in Ohio within the meaning of Section 1 (b) of the Natural Gas Act; that East Ohio is not a "natural-gas company" as defined in the Natural Gas Act; and that the Commission is without jurisdiction over East Ohio.

D. The Commission erred in not finding and holding that the transportation by East Ohio of its own gas through the transmission lines referred to in paragraph B above, solely for the purpose of meeting its only public utility obligation, namely, local distribution in Ohio, is "other transportation" within the meaning of Section 1 (b) of the Natural Gas Act; that East Ohio is not a "natural-gas company" as defined in the Natural Gas Act; and that the

Commission is without jurisdiction over East Ohio. It further erred in its findings in said Opinion No. 158 "that East Ohio's transportation of out-of-state natural gas in such lines is neither 'other transportation' nor 'local distribution' within the meaning of said Section 1(b)."

G II.

The Commission erred in requiring East Ohio to comply with the Commission's accounting requirements as set forth in its orders Nos. 69, 69-A and 73 for the reason that said accounting requirements apply equally to all classes of property owned by a "natural-gas company" while the jurisdiction and authority of the Commission by the provisions of Section 1 (b) of the Natural Gas Act do not extend to the local distribution of natural gas, or to the facilities used for such distribution, or to the production and gathering of natural gas, or to the facilities used for such production or gathering. To the extent that said former orders of the Commission, with which East Ohio is directed to comply as a result of the Commission's order of November 7, 1947, require East Ohio to conform to the accounting requirements of the Commission in respect of any facilities or business, other than those relating to the transportation of natural gas in interstate commerce, each of said orders is beyond the power of the Commission and invalid. Each of said orders should be modified so as to apply only to such transportation property and operations.

III.

A. The information required by the Commission orders with which East Ohio is directed to comply are solely for the purpose of compiling information having no possible relevancy to any governmental object except the regulation of East Ohio's rates for the local distribution of gas in Ohio. The orders and any provisions of the Natural Gas Act construed to authorize their issuance therefore constitute an invasion of the powers reserved to the State of Ohio

under the Tenth Amendment to the Constitution of the United States and an invalid extension of the powers delegated to the federal government by Article I, Section VIII thereof and are unconstitutional and void.

II B. To comply with the Commission's said orders, including those relating to original cost, would impose upon East Ohio an expense between $1,500,000 and $2,000,000. East Ohio's testimony as to this expense was in no way challenged before the Commission and its statement in Opinion No. 158 that East Ohio's estimate is "unsupported" and "not convincing" is arbitrary. Compliance with said orders by East Ohio at this very large expense, even if it were held that East Ohio was technically subject to the jurisdiction of the Commission, will serve no useful regulatory purpose of the Commission since East Ohio has neither rates nor service subject to regulation by the Commission and will serve no useful purpose in the regulation in the State of Ohio of East Ohio's rates for local distribution since original cost is not a factor in such regulation. Said orders of the Commission constitute an abuse of its statutory powers and are arbitrary and invalid as an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States and as a deprivation of East Ohio's property without due process of law and a taking of its property for public use without just compensation in violation of the Fifth Amendment thereto.

IV.

When the Commission made its original order dated February 14, 1939 in Docket No. G-115, which was supplemented by its order dated April 14, 1939, East Ohio filed its applications for rehearing and after denials thereof promptly filed a petition to review such orders in the Circuit Court of Appeals for the Sixth Circuit. By such appeal East Ohio sought to have it judicially determined whether or not it was a "natural-gas company" within the

meaning of the Natural Gas Act and whether the Commission had jurisdiction over it. It was at that time prevented from having this question determined by a motion of the Commission to dismiss the appeal on the ground that the orders involving this question were not reviewable. The Circuit Court of Appeals so held in East Ohio Gas Co. v. Federal Power Commission, 115 F. (2d) 285 (1940).

The ground upon which the Commission's motion to dismiss was made and sustained was that East Ohio could set up its defense that it was not subject to the jurisdiction of the Commission if and when an action was brought by the Commission in the United States District Court pursuant to Section 20 of the Natural Gas Act to enforce its orders. To this date the Commission has made no effort to enforce its said orders of 1939 or any subsequent orders by proceeding under Section 20.

Promptly following the making of said order of June 25, 1946 by the Commission East Ohio filed its application for a rehearing and a stay thereof and both were granted on August 23, 1946 by the Commission, the rehearing being limited to a reargument. The reargument was held before the full Commission on March 19, 1947 but the Commission did not dispose of the matter until November 7, 1947.

Thus from 1939 to 1947, a period of 8 years, no serious attempt has been made by the Commission to enforce the orders of 1939 or any later orders. During all of that period the Commission could at any time have proceeded in the District Court in accordance with Section 20 of the Natural Gas Act.

Said delay in the enforcement of said orders has not interfered with the Commission's performance of its duties and no injury appears of record or otherwise to the Commission on account of this delay. Nor could any such prejudice result, for the plain fact is that East Ohio's only rates subject to regulation by any one are local distribution

rates in Ohio and East Ohio's only public service obligations are local distribution obligations.

J No harm and no prejudice of any kind will result to any one from a stay of the Commission's order of November 7, 1947 until East Ohio's status under the Natural Gas Act is finally decided by the courts.

WHEREFORE petitioner, East Ohio, respectfully prays the Court that pending its disposition of this petition for review it forthwith stay the respondent Commission's order of November 7, 1947 and as a part thereof its order of June 25, 1946 in said proceedings in said Docket Nos. G-115, G-399, G-400 and G-401 (as modified by the order of December 30, 1947); that a copy of this petition be served upon a member of the Commission as prescribed by law and that the Commission be required to certify and file in this Court a transcript of the record in said proceedings; that the Commission's said orders in said proceedings be reviewed and set aside; and that petitioner be given such other and further relief as may be just and equitable.

Respectfully submitted,

THE EAST OHIO GAS COMPANY,

By WILLIAM B. COCKLEY and
WALTER J. MILDE,
1759 Union Commerce Bldg.,
Cleveland 14, Ohio.

WM. A. DOUGHERTY and
C. W. COOPER,
30 Rockefeller Plaza,
New York 20, New York,
Its Attorneys.

K STATE OF OHIO,
CUYAHOGA COUNTY, ss.

W. G. ROGERS, being first duly sworn, says that he is Vice President of The East Ohio Gas Company, an Ohio corporation, petitioner herein, that he has read the foregoing petition for review, and that the statements therein set forth are true as he verily believes.

W. G. ROGERS.

SWORN To before me and subscribed in my presence this January . . ., 1948.

WM. R. PRINGLE,
Notary Public.

Excerpts from Testimony and Proceedings of Hearing on Docket No. G-115 et al. Held March 19-20, 1946.

68 Mr. Purdue: If the Examiner please, I propose a stipulation as follows:

* * * * * * * * * *

71 Mr. Purdue: With respect to Order Number 63, East Ohio has not filed with the Commission annual report FPC Form Number 133 for 1939.

Mr. Cockley: Agreed.

Mr. Purdue: With respect to Order Number 69, and Order Number 69-A, East Ohio has not, as of January 1, 1940, and thereafter, kept its books of accounts in accordance with the uniform system of accounts prescribed for natural gas companies subject to the provisions of the Natural Gas Act, but has kept them in accordance with the uniform system of accounts prescribed by the Public Utilities Commission of Ohio, or permitted by the Public Utilities Commission of Ohio to be used.

Since January 1, 1942 the Public Utilities Commission of Ohio has permitted the use of a uniform system of accounts the same in language as that of the Federal Power

Commission, and since that time East Ohio has been using such permitted system of accounts.

Mr. Cockley: Agreed.

Mr. Purdue: East Ohio did not comply by January 1, 1942 and has not complied to date with gas plant accounts instruction 2-D of the uniform system of accounts prescribed for natural gas companies subject to the jurisdiction of the Commission and Order Number 73.

72

Mr. Cockley: Agreed.

Mr. Purdue: With respect to Order Number 80, East Ohio did not file annual report FPC Form Number 133 for the year 1940.

Mr. Cockley: Agreed.

Mr. Purdue: With respect to Order Number 86, East Ohio has not filed annual report FPC Form Number 133 for the year 1941.

Mr. Cockley: Agreed.

Mr. Purdue: East Ohio has not filed annual report FPC Form Number 133 for the year 1942.

Mr. Cockley: Agreed.

Mr. Purdue: East Ohio has not filed annual report FPC Form Number 2 for the year 1943 or annual report FPC Form Number 2 for the year 1944.

Mr. Cockley: Agreed.

* * * * * * * * * * *

85

J. French Robinson called as a witness, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cockley:

Q. Will you state your name, residence and business? A. J. French Robinson, Cleveland, Ohio. President of the East Ohio Gas Company.

Q. How long have you been president of the East Ohio Gas Company? A. Since November of 1940.

Q. And prior to that what was your business? A. President of the Peoples Natural Gas Company.

Q. What is the Peoples Natural Gas Company? A. Peoples Natural Gas Company is a company owned by Consolidated Natural Gas Company, who also owns East Ohio Gas Company.

Q. And also owns the Hope Natural Gas Company. and one or two other companies. Is that right? A. That is correct.

Q. At the time one of the former applications was heard the evidence was that the stock of the East Ohio Gas
86 Company and of the Hope Company and some other companies was all owned by Standard Oil Company of New Jersey. What is the fact to date? A. None of that stock is owned by the Standard Oil Company of New Jersey.

Q. And is owned by whom? A. Is owned by the Consolidated Natural Gas Company.

Q. When did that change occur, approximately? A. December, 1943.

Q. Counsel would like to have you name the other companies owned by Consolidated besides Hope, Peoples and East Ohio? A. The River Gas Company and the New York State Natural Gas Company.

* * * * * * * * * *

87 By Mr. Cockley:

Q. Mr. Robinson, I show you the paper marked Exhibit 3 for identification, and ask you if that is prepared from the books and records of the East Ohio Gas Company under your direction and supervision? A. Yes.

* * * * * * * * * *

Q. Directing your attention to page 1 of that exhibit, I will ask you where the property shown on that page is located—all of it? A. All of the property shown on that page is located within the State of Ohio.

Q. Has the company any property, any additional property of any kind, located outside of the State of Ohio? A. None whatever, sir.

Q. Directing your attention to the field lines and
88 storage lines, in general what does that item represent? A. Field lines are lines used in our production system for gathering the gas from the wells and starting it on its way to local distribution.

Storage lines are those lines used in and about our two storage areas—in one case for the injection of gas into the storage area and in the other case withdrawing the gas from the storage area to use in local distribution.

Q. And the storage areas are all in Ohio? A. Storage areas are all in Ohio.

• • • • • • • • • •

Q. The next item is miles of transmission line. It shows 903 miles. Is that figure merely the number of running measurement of those lines? A. Yes, sir. 903 miles represents the total length of the transmission lines so
89 classified on our books, which is used for the movement of gas from the state line and from our production and the Maumee Line into our local distribution markets.

Q. That is, if I may so state it, moves both out of State gas and purely Ohio gas. A. That is correct.

Q. To your local distribution centers. A. Yes, sir.

Q. Is that right? A. Yes.

(Question and answer read).

By Mr. Cockley:

Q. Without taking up each of these items is it true of your compression stations, and of your gas wells shown here, your storage wells, and all of them, that all of them are in the State of Ohio? A. That is correct, sir.

Mr. Cockley: I call the Examiner's attention, merely by way of understanding the extent of this operation, to the fact that the total number of consumers here are 550,000 attached to the East Ohio system, and the total population served is some 2,000,000.

Trial Examiner: The exact figures are shown here on page 1 of your Exhibit 3?

Mr. Cockley: I just wanted to direct your atten-
90 tion to them.

Trial Examiner: Yes.

It shows the number as of December 31, 1945, and estimated population is 2,015,000.

Mr. Cockley: Yes.

Trial Examiner: Before you depart from your description of the physical property would you be so kind as to have the witness explain to me the item of 1,011 miles of field lines?

Mr. Cockley: Yes.

By Mr. Cockley:

Q. Will you do that, Mr. Robinson? A. Yes, sir. The 1,011 miles of field lines are those lines in varying sizes from 2-inch up to 8 or 10-inch that are used to connect the producing wells of the East Ohio Gas Company, and the wells under gas purchase contracts of the East Ohio Gas Company into its general distribution system.

Q. From the Ohio fields? A. All located in the State of Ohio.

Trial Examiner: Those are separate and apart from what you hear designate as transmission lines?

The Witness: Yes, sir.

Trial Examiner: These transmission lines, these 903 miles, perform what specific function?

The Witness: The 903 miles of transportation line as classified perform the function of moving gas in one
91 case from the Ohio River northward, and in the other case from Maumee eastward of out-of-state gas as well as of gas produced and purchased in the State of Ohio through these lines to our local distribution areas.

Trial Examiner: So that as I understand it, the 903 miles carry the interstate gas, which you say at some point is intermingled with your home production, or Ohio production. Is that correct?

The Witness: I stated that the lines moved the gas in a northerly direction from the Ohio River, where it is received in the East Ohio system, and moves it eastwardly from Maumee and along the movement of such gas it is commingled with Ohio produced and purchased gas to our common market.

• • • • • • • • • •

92 Q. Where would those domestic consumers be located—in the 69 communities? A. Yes, sir.

Q. All of them? A. All of them located in the State of Ohio, principally in Cleveland, Akron, Canton, Youngstown, Masillon.

Q. Then you set forth the thirty million—odd Mcf of sold to industrial consumers. Where do those sales take place? A. The industrial sales take place in our distribution systems in these various towns and cities located in the State of Ohio.

Q. Do you have any direct sales of any kind from what you classify as your transmission system to industrial consumers? A. None whatever, sir.

Q. Do you have any direct sales from the transmission system or any other sales from the transmission system to other gas companies for resale? A. None whatever, sir.

Q. Either of gas received from out of state or from
93 Ohio gas? A. None whatever, sir.

Q. All right.

Now, will you explain what the item of "Field sales" is given there, 627 thousand—odd MCF? A. Those are sales that are made in the field from the producing wells, or from wells under purchase by the East Ohio Gas Company to drilling contractors, to land owners who have a free gas right under their lease for a certain amount of gas, and the excess is sold to them for their own use, and other incidental sales made in the field in the State of Ohio.

Q. Those sales are made from the producing fields in Ohio, are they, all of Ohio gas? A. Yes, sir.

Q. Is the gas that goes from that consumed entirely in Ohio? A. It is, sir.

* * * * * * * * * *

95 Mr. Cockley: I offer in evidence exhibit for identification No. 3.

Trial Examiner: Exhibit marked No. 3, for identification, is admitted in evidence.

(Exhibit marked No. 3, for Identification, was received in Evidence).

Mr. Cockley: May I have this marked Exhibit 4 for Identification?

It is a paper entitled, "System Map of the East Ohio Gas Company, March 1, 1946."

Trial Examiner: The document just referred to and designated as System Map of the East Ohio Gas Company, March 1, 1946, will be marked Exhibit No. 4 for identification.

(The Document Referred to Was Marked Exhibit No. 4, for Identification.)

By Mr. Cockley:

Q. Directing your attention to Exhibit No. 4, will you state whether that was prepared under your direction
96 from the records of the East Ohio Gas Company? A. It was, sir.

Q. Does it correctly set forth the information shown by those records, and also shown on the map? A. Yes, sir.

Q. Now, Mr. Robinson, will you with the map explain how you have indicated the markets for your gas and the local distribution system of your gas? A. The area outlined in yellow, or the solid area in yellow, represents the distribution areas of the East Ohio Gas Company located in the State of Ohio.

* * * * * * * * * *

97 Q. Will you tell us where you received out-of-state gas into this system? A. Out-of-state gas is re-

ceived at the West Virginia-Ohio State line at a point near Clarington Station.

Q. That is at the lower right hand corner of the map, isn't it? A. That is correct, at a point on the State line in Monroe County, and at Pipe Creek Station, in Belmont County, Ohio, and a point on the eastern portion of the map near Petersburg in Mahoning County.

Q. Below Youngstown, isn't it? A. South of Youngstown; yes, sir. At these points gas is purchased from the Hope Natural Gas Company.

Q. While we are on it tell us what that Petersburg delivery is used for? A. The Petersburg delivery is used on extreme peak days to help augment the East Ohio Gas Company supply of gas, which due to lack of transportation facilities, sufficient amounts of gas cannot be produced in Ohio and purchased in Ohio and moved northward through the pipeline system of Ohio to supply our local distribution demands.

Q. Around Youngstown? A. Youngstown, Niles and so forth.

Q. Then your main deliveries are those two, down at Pipe Creek and Clarington Station, are they not? A.
98 That is correct.

Q. Tell us where the East Ohio line begins, where its transmission lines connect with the Hope lines at that point? A. The East Ohio lines begin at the West Virginia-Ohio state line in all three cases.

Q. That is the low-water mark on the Ohio side, north shore of the Ohio River? A. West shore of the Ohio River, or north shore, as it may be.

• • • • • • • • • •

Q. Now, up to that point, the gas is carried in Hope pipelines which connect with yours, by river crossing. Is that correct? A. Yes.

Q. And it is metered on the Hope side of the River and delivered to you into your transmission line on the west side of the river? A. Yes, sir; that is correct.

Q. Will you tell us, then, from there on in general what is the movement of that gas? A. The general movement
of the gas, after taking it into the East Ohio Sta-
99 tion at Clarington Station and Pipe Creek Station,
is a northerly direction. Sometimes it is regulated or the pressure is cut back at Price Farm, marked on the map, Price Farm, when too much gas gets into the system.

Q. Do you mean by that that is your first regulation point? A. Yes, sir.

Q. For Hope gas? A. Yes.

Q. At Price Farm? A. Yes, sir. The general regulation point of the entire East Ohio Gas Company's distribution system is at Gross Farm, which is about midway between Price Farm and the City of Cleveland.

Q. And that, I note from the map, is also right in the heart of your storage area and right in the heart of your producing area. A. That is correct, sir.

Q. Tell us where Ohio Gas is first introduced into those lines. A. Ohio gas is first introduced to those lines at a point in Franklin Township, Harrison County, just north of the point marked on the map "Smith Farm".

Q. From then on north Ohio gas comes in at various
points. Is that right? A. That is correct, all along
100 the lines clear into the City of Cleveland.

Q. Does gas ever flow from the East Ohio pipe lines, any of these that you have mentioned, back to the Hope Company? A. It does not, sir. The movement is always northward.

Q. And always has been? A. Yes, sir.

101 Q. Will you explain in general to the Examiner
and for the record how this system of yours operates, at what point the flow of gas is generally controlled in order to take care of the local distribution in this area that is north of Gross Farm Station, north and east of Gross Farm Station. A. Gas is regulated at Gross Farm so that certain quantities of gas move northward into Akron and the Cleveland area, as well as on peak days southwestward through a line extending down towards Knox County.

The flow in that line is sometimes northward and sometimes southward.

Going east from Gross Farm, the gas is controlled so that certain amount of the gas passes through a 14-inch and a 16-inch line going eastward to Austintown Junction, where, again, the gas is controlled so that a certain amount goes to Warren, Niles, Youngstown, Middletown, Petersburg, and East Palestine. Some gas is brought into the system through East Ohio Gas Company's pipeline number 6, which extends from Maumee, Ohio eastward to Valley City Station, and on eastward to where it connects with our main trunk pipelines.

The gas entering our system in this line moves in an easterly direction to Valley City, thence, northward into the Western part of the City of Cleveland. After some gas has been received at the Junction of the main lines at
102 Bresh Farm, the movement at some times is northward into Cleveland and other times, particularly in the summertime, Southward and put into our storage areas, which are shown in and around the Gross Farm, outlined in blue.

Q. You referred to gas coming into the line from Maumee, did you not? A. Yes.

Q. From whom is that gas purchased? A. Panhandle Eastern Pipeline Company.

Q. And they deliver to you where? A. At a station just south of Maumee, known as our Maumee Station.

Special Examiner: Where is that on the map?

The Witness: In the extreme northwestern portion of the map.

Mr. Cockley: Lucas County?

The Witness: Yes, on the west bank, or a little west of the west bank of the Maumee River.

By Mr. Cockley:

Q. All the gas you get from Panhandle comes at that delivery point. Is that correct? A. That is correct.

Q. Does gas ever move from your system into the Panhandle System at that point? A. It does not.

103 Q. Or any other? A. It does not.

Q. And that gas comes to you at what pressure? A. About 320 pounds at Maumee. Our contract provides up to 350 pounds.

Q. Where do you regulate that pressure? A. First regulation is at Valley City.

Q. Shown on the map south of Cleveland? A. South of Cleveland, yes.

Q. From that point I think you have already said you could put it into Cleveland or you can send it on down to Akron ~~or~~ put it into storage. A. That is correct.

Q. In any direction you may demand or require? A. That is right.

Q. And that gas likewise is all sold through your local distribution plants? A. It is.

Trial Examiner: What is the distance from Maumee point where Panhandle delivers the gas to Valley City Station?

The Witness: 98 miles, sir.

Trial Examiner: How far is Valley Station from Cleveland City Gate?

The Witness: About 12 to 15 miles.

Mr. Gorman: Pipeline miles or as the crow flies?

104 The Witness: Pipeline miles.

Trial Examiner: From Maumee to Valley City Station it moves under the original pressure of Panhandle. Is that correct?

The Witness: It moves under its original pressure, yes. That is correct.

By Mr. Cockley:

Q. The gas you purchase from Panhandle is all subject—you purchase under Schedule 61 of the Federal Power Commission, do you not? A. Yes.

Q. And there since has been a recent order of the Federal Power Commission regulating Panhandle rates. Is that so? A. Yes.

Q. And schedules filed pursuant to that order? A. Yes.

Q. How has the price at which you purchase Hope gas been fixed? A. The Federal Power Commission has set a price, and same is so listed in the schedule setting forth that price at which East Ohio pays Hope for the gas it receives.

Q. So the price of all of this out-of-state gas you purchase has been regulated and set by the Federal Power Commission. Is that correct? A. That is correct.

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106 Trial Examiner: What is the distance from Pipe Creek Station to Cleveland?

The Witness: From Pipe Creek Station to Cleveland?

Trial Examiner: What is the transmission pipeline mileage there.

The Witness: 118½ miles.

Trial Examiner: What size pipe is that?

107 The Witness: 18 and 20 inch mostly.

Mr. Gorman: What do you mean by mostly?

The Witness: Some gas moves through a 12-inch line. The majority of the pipeline is either 18-inch or 20-inch, with the exception of a little bit of T. P. L. Number 1 which is 10-inch.

Mr. Gorman: Where is that section of 10-inch?

The Witness: Section of 10-inch goes from Gross Farm northward.

Trial Examiner: Is that gas transported through that line at the same pressure at which it was received at Pipe Creek Station from Hope Natural Gas Company?

The Witness: The gas moves northward through these transmission lines losing pressure as it moves northward, necessary for the friction loss, and for the most part, enters local distribution at its own pressure. However, in some cases it is necessary to repump the gas at Robinson

Station at the Gross Farm for distribution to the Youngstown-Warren-Niles area.

It is also necessary to repump this gas when it goes into our storage areas.

* * * * * * * * * *

108 By Mr. Cockley:

Q. At Gross Farm, Mr. Robinson, state the fact as to whether or not you can control the direction of the flow from all of these present lines from the Ohio River north to connect with Hope lines? A. Yes, that flow can be diverted in many directions in and around Gross Farm.

108-A Q. And is in accordance with the demands of the various parts of your system? A. That is correct.

Q. If you have a nerve center to your whole distribution picture here, where is it? A. Gross Farm is the center of all of our local distribution operations.

Q. Do you ever in these pipelines transport gas for other persons? A. No, sir, we have not done that.

Q. Or held yourself out as being willing to transport gas for other persons? A. No, sir, we have not.

Q. Have you ever carried anything in this transmission system here except gas owned by the East Ohio Gas Company by purchase from Hope or other persons? A. No, we have not.

Mr. Cockley: I offer in evidence Exhibit Number 4 for identification.

Trial Examiner: The document marked Exhibit 4 for identification, and designated as system map of the East Ohio Gas Company, March 1, 1946, is admitted in evidence.

(Exhibit Number 4 for Identification Was Then Admitted in Evidence.)

Mr. Cockley: I ask to have marked as Exhibit 5

109 for identification a paper entitled "The East Ohio Gas Company, names of sellers of gas purchased by

the company and the points of delivery of such gas, February, 1946."

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131 Q. Have you any public utilities service of any kind—does East Ohio Gas Company render any public utilities service of any kind, that has not been regulated by the Public Utilities Commission of Ohio? A. We have not, sir.

Q. In rate proceedings in Ohio, Mr. Robinson, I will ask you to look at that Exhibit No. 4, which is the map of East Ohio system, in the rate proceedings involving the City of Cleveland, for instance, will you indicate on that map what of your properties the Public Utilities Commission of Ohio inventoried, examined for depreciation, and included in a rate base in determining the rates for Cleveland? A. They included a complete study of all the property shown on this map in determining the rate for the City of Cleveland except the distribution property colored yellow elsewhere on the map than Cleveland.

Q. How about the Maumee line? A. Yes, sir; that was included.

Q. In the last case. A. In the last case.

Q. But not in the 1937 case. A. That is right.

132 Q. It was not constructed? Is that right? A. That is right. It was included in the last Cleveland case.

Q. Did they examine and value all these transmission lines from the Ohio River through Gross Farms North? A. Yes.

Q. And all the other transmission lines you have in your system? A. Yes.

Q. And your complete production system property? A. Yes.

Q. And your general property? A. Yes, sir.

Q. All of it? A. All of it; yes.

Q. And then allocated part of it? A. Yes.

Q. And the storage property? A. Yes, sir.

Q. And all the local distribution property in Cleveland area? A. That is right.

Q. Does East Ohio Gas Company own any lines that cross state boundaries? A. They do not.

133 Q. If your local distribution business as you have described it were terminated, what use would you have for any of the properties shown on that map? A. None whatever, sir. All of our business is local distribution.

Q. And your purchases and sales and receipts and deliveries are all in Ohio? A. Yes, sir.

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137 Q. Order No. 69 and Order 69-A, and Order 73, of the Federal Power Commission in general direct natural gas companies to reclassify and state the cost, original cost of all their properties. You are familiar with that? A. That is correct; that is my understanding.

Q. Did you make any estimate, general estimate, of the cost of attempting to comply with that order of the

138 Commission? A. Yes, sir.

Q. What is that answer, please? A. At the present time, with the increased cost of labor, it is our best estimate that the reclassification will cost between three-quarters of a million and a million dollars, and that the original cost will cost a like amount.

Q. So far as statement of original cost is concerned—withdraw that.

You are including in that estimate, I take it, your distribution property and your general property and your production property as well as your transmission property. Is that correct? A. That is correct.

Q. The order makes no distinction between those, does it? A. None whatever.

Q. Will you tell us what part of your property is used for purposes of local distribution? A. All of our property is used for local distribution.

Q. But you do classify for accounting purposes, do you not? A. Yes. Our property is classified for accounting purposes as distribution, transmission—

Q. About how much of it is for distribution?

Mr. Gorman: May I have the previous question
139 and answer read back, please?

(Question and answer read).

Mr. Gorman: Mr. Examiner, I ask to have stricken from the record the answer of this witness to the previous question on the basis that it expresses an opinion as to the very matter which is the subject of investigation here; a statement which this witness is not prepared to make.

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142 Mr. Gorman: May we have the question and answer read? Maybe we can understand it better.

(Question and answer read).

Mr. Gorman: I think that statement stands by itself.

Trial Examiner: I would like to ask this witness a clarifying question there.

Mr. Witness, when you use the term "All of the property", do you mean the transmission line, production, as all part of your distribution line?

The Witness: What I intend to convey is that our sole purpose in business is to distribute gas. Therefore, any part of our system is used for that purpose.

Trial Examiner: That is the purpose of every line that engages in that line of business, to distribute gas. That is why it is taken out of the ground. That is what you are alluding to, to distribute gas as your ultimate objective.

The Witness: That is all of the business East Ohio Gas Company has, sir.

Trial Examiner: I will sustain the objection to that.

Mr. Gorman: There was originally a motion to strike, if the Examiner please.

Trial Examiner: Yes. Are you testifying here as
143 an expert for the purpose of designating what the system is, or are you just detailing what your conception is of operations of any gas?

The Witness: I think I am testifying from a lifetime experience in the gas business as to the function of the various phases and steps of the gas business.

Trial Examiner: What do you consider that part of the system that transmits the gas to the distribution lines or distribution system?

The Witness: As classified on the books of the company we have classifications of distribution; we have classification of production; we have classification of transmission, and storage.

Trial Examiner: And storage?

The Witness: And each of those classifications, the function of them in the East Ohio Gas Company, is to distribute gas locally. I have no idea as to what the scientific determination may be. That is the practical operating standpoint of the company.

Trial Examiner: I see. In other words, the system consists of transmission system, production system, storage system, and a distribution system.

The Witness: The purpose of which is all to market gas; yes, sir.

Trial Examiner: To market gas.

144 The Witness: Yes, sir.

Trial Examiner: That is our understanding. I do not see there is any serious difference of opinion.

I think the question as asked, with that explanation of the witness as to what he meant, cannot mislead anybody. I would sustain the objection, and have sustained the objection, to the answer as then standing. But in view of the witness' explanation as to what he meant by it I think there cannot be any misunderstanding as to what he meant.

I do not think he is attempting to pass any legal opinion as to what all of that constitutes. What he says is true as

to the ultimate use of gas, no matter how far it is transmitted or carried intrastate—it is all intended for the purpose of consumption by means of distribution.

Mr. Gorman: We will agree with that.

Trial Examiner: Yes. I think that is what his testimony purports to be.

The Witness: That is correct, sir.

Trial Examiner: That is what you mean.

The Witness: That is right.

Trial Examiner: I will just reverse that ruling and admit the evidence. Let the answer stand to which the objection has been made.

You may proceed, gentlemen.

By Mr. Cockley:

145 Q. How much of your property do you classify as a matter of accounting, percentagewise as distribution property? A. 52.7 per cent.

Q. And production and storage? A. 16.3 per cent.

Q. Transmission? A. 27.7 per cent.

Mr. Gorman: May I inquire at this point whether these percentages are based upon book valuation, or how are they computed?

The Witness: Taken directly from the books of the company.

Mr. Gorman: In other words, book value percentage.

The Witness: Yes, sir.

By Mr. Cockley:

Q. Do you have addition to that some general property? A. Yes, sir; 3.3 per cent.

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153 Q. Now it also has been shown and referred to here that the company did not seek a review of the Commission's order in Docket G-266, and in Docket G-458.

Did you seek and obtain advice of counsel in those cases as to whether or not the order there made was re-

154 viewable? A. We did, and were informed they were not reviewable.

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Q. Was any petition for rehearing filed in behalf of the East Ohio Gas Company in Docket No. G-266 or Docket G-458? A. No.

Q. Was any appeal ever taken from the final order in either of those Docket numbers to any Circuit Court of Appeals in the United States? A. No, sir.

Q. And that failure to take any action on your part was after seeking and obtaining advice of counsel that the
155 orders were not appealable. Is that correct? A. Yes.

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157 Q. Mr. Robinson, I am calling your attention to pages 98 and 99 of the record to the question, "Will you tell us, then, from there on in general what is the movement of that gas?" Read your answer and see if there is anything you want to add to it to clarify it. A. The sentence beginning "Sometimes it is at Price Farm", and so forth, should read, "Sometimes it is regulated or cut back, or the pressure is cut back at Price Farm".

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158 Cross Examination

By Mr. Purdue:

Q. Mr. Robinson, as I understand your testimony, your company has, does it not, an 18-inch pipe line extending from the Pipe Creek Station on the Ohio River to Cleveland? A. That is correct.

Q. Is that pipe line designated by your company, T. P. L. No. 2? A. It is.

Q. What does T. P. L. stand for, Mr. Robinson? A. Designation we have at Trunk pipe line systems.

Q. I see. In other words, T. P. L. stands for trunk pipe line, does it? A. Yes, sir.

159 Q. Does your company have another line designated as T. P. L. No. 3, extending from Clarington Station at the Ohio River to Philadelphia—to Cleveland? A. Yes, sir; it has.

Q. When was T. P. L. No. 2 constructed? A. 1903.

Q. When was T. P. L. No. 3 constructed? A. 1907.

Trial Examiner: Referring to what Exhibit, now, Mr Purdue?

Mr. Purdue: If the Examiner please, I was not referring to any exhibit in particular. However, the numbers that the witness has just testified to appear upon the system map, Exhibit No. 4.

Trial Examiner: All right. Thank you.

By Mr. Purdue:

Q. Mr. Robinson, is it true that prior to 1909, the East Ohio Gas Company and its predecessor of the same name did not purchase or distribute Ohio gas? A. I am not sure. I think that is correct, although I am not positive.

Q. Now, Mr. Robinson, to refresh your recollection I hand you the application of respondent, that is the East Ohio Gas Company, for a rehearing—

Mr. Cockley: We will admit that. You do not
160 need to waste time on it. We did not distribute Ohio gas until it was discovered at about the date you mentioned, or subsequent to it.

By Mr. Purdue:

Q. Then it is true that prior to 1909, the entire supply of East Ohio Gas Company was procured at the Ohio River from the Hope Natural Gas Company of West Virginia. Is that right? A. Yes, sir.

Q. So, then, T. P. L. No. 2, and T. P. L. No. 3 were constructed, were they not, for the sole purpose of carrying out of State gas? A. No, that is not so.

Q. What other gas were they constructed for the purpose of carrying? A. There was certainly in the minds of the

officers at that time that gas would be developed along the lines and it would be so put in.

Q. Well, now, why was it then that it was not until the year 1909 that you began to purchase or distribute Ohio gas? A. I am sure I could not tell you, sir. I was not there. I have seen more records that would explain it in the files of the company.

Q. Mr. Robinson, so far as you know, the sole pur-
161 pose of T. P. L. No. 2 and T. P. L. No. 3 was to carry out of State gas, was it not?

Mr. Cockley: I object to it. He already has answered the question.

Mr. Purdue: He has not answered it, Mr. Examiner.

Mr. Cockley: He said that was not the sole purpose of it. You are trying to put those words in his mouth.

Mr. Purdue: I object to this interruption, if the Examiner please. I think this is a proper question.

Trial Examiner: All right. He may answer the question.

The Witness: I stated before that certainly the officers of the company had in mind developing gas along these lines and would use it for that purpose.

By Mr. Purdue:

Q. Mr. Robinson, how did you know that when you say you were not there? A. I don't know it. I say, I assumed that. Being an operator that certainly would be my intention now and is my intention of laying T. P. L. No. 7. I expect to develop some gas along it and expect to put it into that line.

Trial Examiner: As I gather from your testimony, it is that that is what you would have done had you constructed the line.

The Witness: That is correct, sir.

Trial Examiner: But what it was constructed for
162 you do not know.

The Witness: No, sir; I do not.

Trial Examiner: I see.

By Mr. Purdue:

Q. Mr. Robinson, does your company have a line designated T. P. L. No. 4, which extends from Clarington Station to Gross Farm, and which from Clarington to Price Farm is 20 inches in diameter, and from there on to Gross Farm 18 inches? A. That is correct.

Q. Does your company have still another line extending from Clarington Station to Cleveland, called T. P. L. No. 5, and which has a diameter of 20 inches? A. That is correct.

Q. Mr. Robinson, I hand you the application in Docket No. G-695, and direct your attention to Exhibit "C" thereto. I will ask you what the black dot surrounded by a circle in Wetzel county represents? A. Hastings compressing station, Wetzel county, West Virginia, the location there.

Q. Is that a compressor station of the Hope Company? A. It is.

Q. Mr. Robinson, do you note that Exhibit "C" shows an 18-inch line and two 20-inch lines extending from Hastings Station to the Ohio River in the vicinity of
163 Clarington? A. Yes, sir.

Q. Are those figures correct so far as you know? A. So far as I know, yes, sir.

Q. Is it also true that exhibit "C" shows another line 18 inches in diameter extending from Hastings Station to the Ohio River in the vicinity of Round Bottom? A. Yes, sir; that is correct.

Q. All right. So that the fact is, is it not, Mr. Robinson, that we have one 18-inch line and two 20-inch lines approaching the Ohio River in West Virginia, and one 18-inch line and two 20-inch lines of the East Ohio Company extending away from the River in Ohio? A. That is correct.

Q. Now, also, there is an 18-inch line of the Hope Company which approaches the river in the vicinity of Round Bottom and an 18-inch line of the East Ohio Company extending away from the river in the State of Ohio? A. That is correct.

Q. What difference, if any, is there Mr. Robinson, between the lines of the Hope Company in West Virginia that approach the river and the lines of your company in Ohio that extend away from the river? A. Will you read that for me.

(Question read).

The Witness: From the Hope lines in West Vir-
164 ginia there are headers constructed, and from these headers smaller lines are run across the river, and on the west bank of the river, again, a header is constructed. These headers then are connected to the lines of the East Ohio Gas Company.

I am not sure that is what you mean, but those are the facts of the matter.

By Mr. Purdue:

Q. The headers and the small lines in the river, to which you have testified, are an ordinary river crossing, are they not, Mr. Robinson, ordinary submerged river crossing? A. There are various kinds. Some use multiple lines, various sizes from eight to twelve inches, or whatever it may be. This is a particular method the Hope Natural Gas Company used in getting the gas to the East Ohio system.

165 Well, it is an ordinary kind of river crossing, isn't it? A. I just said, management has different ideas. On my last Maumee Line I used an entirely different method. Theirs is as good as mine, no doubt.

Q. The headers and the small lines are a river crossing, at any rate, is that right? A. Yes. They constitute a river crossing. Headers are not.

Q. Constitute a river crossing? A. Yes.

Q. Going back to my question, my question was not about the facilities in the river but about the lines approaching the river and receding from the river. I will repeat the question. What difference, if any, is there, Mr. Robinson, in the lines of the Hope Company approaching the Ohio River in the vicinity of Clarington and Round Bottom and

the lines of your company leaving the river at those points? A. I know of no difference in the texture of the pipe that is in the lines at all. I assume it is all the same pipe.

Q. Do you know of any difference in any other respect? A. No, they are all pipelines.

Q. The gas flows as freely in the lines of the Hope Company as it does in the lines of your company, does it not?

A. Probably a little more so, because it has lost a
166 little pressure as it progresses.

Q. Is the pressure the same on the two sides of the river? A. No.

Q. How much difference is there? A. Very small.

Q. Is it substantially the same? A. Yes, I would say substantially the same.

Q. Is the movement of gas stopped at the Ohio River? A. It is not.

Trial Examiner: Mr. Purdue, pardon me, please . . . Go ahead.

By Mr. Purdue:

Q. The gas that moves in the lines of the Hope Company which you have testified to is destined for markets in Ohio, is it not? A. Yes, sir, in the particular lines we just mentioned.

Q. Yes. And is the gas that moves in the lines of your company to which you have testified going away from the river destined for markets in Ohio? A. Yes, sir.

Q. Does the gas flow from the Hope lines into your lines 24 hours a day? A. Hope delivers us gas 24 hours a day.

Q. Day in and day out? A. Yes, sir.

167 Q. Mr. Robinson, I hand you the instrument which has been incorporated by reference in this proceeding and which is designated "Hope Natural Gas Company Rate Schedule, FPC No. 1." I call your attention to the following language in paragraph 5 of that agreement:

"The Hope Company undertakes and agrees, subject to the provisions of Paragraph 7 hereof, that at all times dur-

ing the continuance of this contract it will maintain in good order and condition all its compressing stations, pipelines, connections, and other facilities in the State of West Virginia in order to enable it to carry out its obligations under this contract and to deliver gas hereunder in such volumes as to maintain pressure equivalent to 225 pounds at the junction point of its lines with the lines of the Ohio Company as at present constructed and operated at the Ohio River."

I will ask you if the purpose of that provision was not to obligate the Hope Company to deliver gas to your company at such pressures as would enable the gas to be carried to points of distribution on your system? A. At that time I think that is correct, the time of that contract. But the markets have so developed that that would be an impossibility at the present time.

Mr. Cockley: What was the date of that contract, Mr. Purdue?

Mr. Purdue: The date of that original contract was March 1, 1940.

168 By Mr. Purdue:

Q. Mr. Robinson, that contract continued in effect between your company and Hope until what date? A. I'll have to get it. I can't remember those. I will have to look it up.

Mr. Cockley: It is all in that rate schedule which you have before you.

By Mr. Purdue:

Q. The contract to which I have referred—did it continue in effect until it was superseded by the contract between your company and Hope dated April 27, 1944, and which is on file with the Commission as Hope Rate Schedule FPC No. 8? A. Yes, sir, that is correct.

Mr. Cockley: There were other—

The Witness: There also has been a supplement now to FPC No. 8.

Mr. Cockley: And there were modifications of that contract from time to time. There are main contracts, but there were modifications and rate modifications.

By Mr. Purdue:

Q. The provision I just read you continued in effect until April of 1944, did it not, Mr. Robinson?

Mr. Cockley: Does not the file you have show the fact about it?

Mr. Purdue: It does.

169 The Witness: From my data here it would appear that that clause would be effective up until April 22, 1944.

By Mr. Purdue:

Q. I now hand you Hope Natural Gas Company Rate Schedule FPC No. 8 and call your attention to Article 6 thereof at page 6, which reads as follows:

"Pressure: Gas delivered hereunder at the points of delivery shall be delivered by Hope at such pressures as East Ohio may from time to time reasonably request, but Hope shall not be required to deliver at pressures in excess of 300 pounds per square inch gauge."

I will ask you if the purpose of that provision was not to assure the delivery of gas to points of distribution on your system? A. The purpose of that pressure is primarily to get volume of gas through our system, and—

Q. To points—

Mr. Cockley: Let him finish, please.

The Witness: —volumes in our system to our distribution areas. The pressure and volume, for the most part, does go to our market without additional compression. Some of the gas that is delivered from the lines which receive the pressure at 300 pounds is compressed by the East Ohio Gas Company and transportated to our Youngstown-Warren-Niles area.

By Mr. Purdue:

170 Q. I hand you Panhandle Eastern Pipeline Company, FPC No. 61, being the contract between the Panhandle Company and yours, dated February 4, 1943, and call your attention to the language of Article 12 thereof as follows:

"Pressure: Eastern agrees to use due care and diligence to furnish gas hereunder at such uniform pressure as East Ohio may require up to, but not exceeding, 350 pounds to the square inch gauge pressure at the point of delivery. In the event Eastern is unable to maintain such uniform pressure so that East Ohio is not able to take substantially uniform hourly deliveries throughout a day, East Ohio, in such event, shall not be obligated under Article 2, Paragraph 4-(a) above, to purchase and receive from Eastern gas at a higher hourly rate from 7 p. m. to 7 a. m. than the average hourly rate of delivery during the preceding 7 a. m. to 7 p. m."

What was the purpose of the provision which I have just read to you respecting pressures? A. The purpose of the provision was in order to secure a volume of gas from Panhandle as specified in the contract; namely, 50 million cubic feet per day.

Q. And for the further purpose, was it not, of the gas being delivered through your system to distribution points and storage? A. Naturally. We do not pump any of the gas on the Panhandle line except that part that
171 goes to Gross Farm, and then it is pumped Eastward to Youngstown, or Niles, as I previously stated, or into storage.

Q. There is a detail in connection with your testimony in Docket No. G-458 given by you on April 21, 1943, that I would like to clear up. I have reference to your testimoney at page 112 as follows:

"Question. Is there any interruption of the movement of the gas from the time that it is pumped at the Hastings Sta-

tion in West Virginia until it reaches the city gates in Ohio?

"Answer. Yes, I would say that there is some slowing down of the movement from the very beginning when it leaves Hastings, due to the friction in the pipelines. That is, the gas which moves from the Ohio River northward is sometimes cut back at our Gross Farm station and is regulated again at our distribution centers, and finally reduced down to a 4- or 6-ounce basis before it goes to the consumer."

Now, I will ask you when you say the gas is sometimes cut back at your Gross Farm Station, you meant, did you not, that the movement northward of a portion of the gas is sometimes stopped and not that the movement of all the gas is stopped? Is that right? A. Either way you want it. All the gas can't be stopped. Some of its goes through. What part of it is stopped I have no idea. ~~We just~~ cut down volume by that method.

Q. As a matter of fact, in the situation to which
172 you testified, at Gross Farm all of the gas is not stopped, is it? A. No, sir. I don't think I testified that it was.

Q. I don't think you did, either, Mr. Robinson. A. I understood you wanted it cleared up.

Q. I don't think you testified that way, but I wanted it cleared up. The language was not quite clear to me.

Mr. Robinson, I hand you Exhibit No. 4 and call your attention to the shaded area on the right-hand side of the map, a square including Youngstown and the vicinity thereof. I believe you testified that was a distribution area. A. Yes, we distribute the gas in the Youngstown area.

Q. Do you have pipelines in the area shaded in yellow to which you have testified? A. Naturally.

Q. Are those pipelines included within the 5,490 miles of distribution line shown on page 1 of your Exhibit No. 3?

(Question read.)

The Witness: They are.

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counts the same in language as that of the Federal Power Commission, and since that time, East Ohio has been using such permitted system of accounts."

Now, do you agree with that stipulation, Mr. Robinson? A. No doubt it is correct, yes.

175 Q. Gas plant accounts instruction 16, transmission and distribution plant of that system of accounts which appears at page 51 of item 6 of Exhibit No. 1, provides as follows, does it not: "For the purpose of this system of accounts "A" Transmission system means the land, structures, mains, valves meters, boosters, regulators, tanks, compressors, and their driving units and appurtenances and other equipment used primarily for transmitting gas to a particular municipality or distribution system. The transmission system begins at the outlet side of the valve at the connection between the gathering lines or other source of supply and inlet to the transmission compressor station or other gathering terminals, and includes the equipment at such connection that is used to bring the gas to transmission pressure and ends at the inlet side of the equipment which meters or regulates the supply of gas into the distribution system. It does not include storage land or structures.

"B. Distribution system means the mains which are provided primarily for distributing gas within a distribution area or for connecting two or more districts within a distribution area, together with land, structures other than storage land and structures, valves, regulators, services, and measuring devices. The distribution system begins at the inlet side of the equipment which meters or regu-

176 lates the entry of gas into the distribution system, and ends with, and includes, property on the customer's premises."

Now, that is a correct statement of those instructions, is it not, Mr. Robinson? A. Yes, sir.

Q. In the light of those instructions I will again ask you why you classified the Youngstown lines as distribution

lines and not as transmission lines? A. For the same reason I gave before.

Trial Examiner: May I ask a question here?

Mr. Cockley: It seems to me the confusion arises from the start when he said "Do you have pipe lines in the city of Youngstown?

Of course we have pipe lines. We have pipe lines in distribution plant, pipe line in transmission plant and pipe lines in gathering plant. They are all pipe lines, unless he is using "Pipe lines" in some technical sense.

From that original confusing term he then proceeds to ask about these figures here. I don't see what we are getting at.

Trial Examiner: I was going to inquire of Commission counsel to please illustrate what pipe lines he was referring to. You mentioned Youngstown pipe line. In the City of Youngstown?

177 Mr. Purdue: Yes, Mr. Examiner. Pipe lines in the yellow-shaded area.

Trial Examiner: Just what is that yellow-shaded area? In that yellow-shaded area I have noticed what appears to me to be a small dot and with the name "Youngstown" over it.

Mr. Purdue: I am referring to the square, Mr. Examiner.

Trial Examiner: How large is that square? What does it embrace? Is that a township? Is that a County? What area does it cover, or is that simply the City of Youngstown alone, although Youngstown seems to be shown by a small circle.

By Mr. Purdue:

Q. Mr. Robinson, what area is embraced within the yellow square to which I referred? A. That is Youngstown proper and the colored area covers the township. That also covers surrounding territory.

Q. To what use are your lines put? A. It moves the gas into the homes of the individual customers within the area

and moves it about the city. Some of it goes south to other areas. Some goes north into Gerard.

Q. Was the fact that it does move the gas to the consumers' premises, and the other particulars to which you
have testified, the reason you classified the lines as
178 distribution lines? A. No, I think not.

Q. What was the basis of your classification of those lines? A. Those lines were classified way back many years ago under the basis of the Ohio Public Commission code, I imagine, because they have been carried that way on the books for a long time. The original basis was prescribed by the Ohio Commission, or it might even have been before the Ohio Public Utilities Commission. I don't know. I will have to look it up.

Trial Examiner: You don't know?

The Witness: No.

By Mr. Purdue:

Q. Do they comply with the present uniform system of accounts? A. Yes, as far as I know.

Mr. Cockley: You mean the Ohio system.

Trial Examiner: Was that a question you were asking this witness, Mr. Cockley?

Mr. Cockley: I wanted to clarify this. He said, "Comply with the present uniform classifications". You mean the FPC classification?

Mr. Purdue: The classification I just read the witness.

Trial Examiner: Are you referring to the Ohio
179 Public Service Commission's classification or the
Federal Power Commission's classification?

Mr. Purdue: I am referring to the Federal Power Commission's classification. As the evidence shows it was adopted by the Ohio Commission and made effective as to this company.

Trial Examiner: Then it includes both Federal Power and Ohio. Is that it?

Mr. Purdue: Yes, Mr. Examiner.

Trial Examiner: All right.

Mr. Cockley: I think maybe I can clarify this thing so the record will not get confused, and save time.

The company is in the process of making a re-classification. That has not progressed very far. These statistics, being annual statistics—

Mr. Purdue: If your Honor please, I object to the testimony on the part of counsel.

Mr. Cockley: I thought we had explained all this to you yesterday when we made this stipulation, explaining that that code of the Ohio Commission—the Ohio Commission gave us permission to use the Federal Power Commission code of accounts and we proceeded to do it.

Trial Examiner: When was that permission granted, sir?

Mr. Cockley: April 15, 1942.

Trial Examiner: It has taken this length of time,
180 over four years, to reclassify them?

Mr. Cockley: Mr. Examiner, during the war period labor to do this was just not obtainable at any price. It is a job that will require scores of accountants in order to do it. It means the expenditure of probably $750,000 to complete it. It will take in normal times, when you can get all the help you need, two or three years to do it.

This Commission recognized that when they put it into effect by authorizing the companies two years time to do it. I don't believe any large company was able to get their reclassification in within two years.

Trial Examiner: I think inquiry was directed to the purpose of getting that information.

Mr. Cockley: What is that?

Trial Examiner: My inquiry was directed to you for the purpose of getting that information.

By Mr. Purdue:

Q. Exhibit No. 3 shows, does it not, 903 miles of transmission lines? A. Yes, sir; it does.

Q. Is T. P. L. No. 2 included within that classification of transmission lines? A. Yes, sir.

Q. What was the basis of that classification? A. The same basis as I gave before. It was following the
181 Ohio Public Utilities Commission prescribed method of accounting.

Q. Can you produce the definition of the Ohio Public Commission to which you referred which was in effect prior to the Federal Power Commission system? A. Yes. I don't have a copy of the code with me but I will get one.

Q. Will you do so, please?

Mr. Cockley: I will hand him copy of the code.

The Witness: I have had handed me a copy of uniform classification of accounts of natural gas utilities, Public Utilities Commission of Ohio, effective January 1, 1921. I note reference to transmission measuring station equipment under 225, on page 53, transmission line equipment under 226, of page 53, and another transmission equipment on page 227.

Mr. Cockley: Item 227.

The Witness: Yes. Shall I read that?

Item 225, page 53, is as follows:

"Charge to this account the cost of equipment owned by the utility and used by it in measuring natural gas before it is transmitted to the distribution system. In the charges to this account include the cost of meters, gauges, and other equipment used in the transmission system measuring station."

Heading 226, "Transmission Line Equipment: "Charge to this account the cost of pipe line equipment owned
182 by the utility and used by it in transmitting natural gas from the compressing or boosting stations, or other points where the transmission system begins."

"In the charges to this account include the cost of transmission line pipe, collars, couplings, other fittings, gates, valves, and other equipment accessory to the transmission

pipe lines, the cost of hauling, ditching, constructing supports, conduits, and so forth, laying pipe, refilling, repaving, damage to crops, fences, and so forth; also the cost of tools consumed, other supplies used, and expenses incurred in the construction of transmission lines."

"The records supporting the entries to this account shall be so kept that the utility can furnish information as to the diameter, length, weight, material, price, and date of installation of each transmission line; also the cost and date of installation of collars, couplings, and other fittings."

Account No. 227. "Other transmission system equipment. Charge to this account the cost of equipment not provided for elsewhere, owned by the utility, and used by it exclusively in the transmission system."

Trial Examiner: Are those provisions of the Public Utilities Commission of Ohio accounts which correspond in their numbers to the numbering of the Federal Power Commission's uniform system of accounts?

183 The Witness: No, sir; they do not.

Trial Examiner: But the language is the same?

The Witness: No.

Mr. Purdue: No, your Honor. It is not the same.

Trial Examiner: All right.

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By Mr. Purdue:

Q. Do you have transmission line equipment in the Youngstown area colored in yellow, which you have testified to? A. No, sir.

Q. Is your Maumee to Brush Farm line designated by you as TPL No. 6 in your Exhibit No. 4, included by you within the 903 miles of transmission line? A. It is.

Q. On what basis did you classify that line? A.
184 Same as the other trunk pipe line.

Q. How many town border regulator stations do you have in the Cleveland area? A. Three major ones.

Q. Are they the Hummel Road, Willow Station, and Dunham station regulator stations? A. That is correct.

Q. Are they shown by the rectangle opposite the names "Hummel Road, Willow Station, and Dunham Station" on Exhibit "N" to your application in G-695? A. I don't happen to have one of those with me at the moment. Yes, that is diagrammatical representation of them.

Q. North of those stations do you have any transmission pipe lines? A. We have pipe lines that carry gas classified on our books as distribution lines.

Q. To what use are those lines put, Mr. Robinson? A. Movement of gas.

Q. To where? A. All over the city of Cleveland.

Q. To low pressure regulators? A. Yes, sir.

Q. Then to what use are the lines put beyond the low pressure regulators? A. Moving the gas from the low
185 pressure regulator to the individual consumers.

Q. Willow station is located at the terminus of TPL No. 1, TPL No. 2, and PL No. 3, according to this exhibit. Is that a correct representation? A. Yes, sir.

Q. Is the Dunham station located at the terminus of TPL No. 5, as indicated by Exhibit "N"? A. That is correct.

Q. I want to ask you a question of another nature relative to Exhibit "N".

I take it that the rectangle at the bottom of the page adjacent to which is the name Hastings, refers to the Hastings compressor station. A. That is correct.

Q. Do the figures in red which appear to be figures designating number of pounds as illustrated by the figure 330 at Hastings, indicate the normal and usual operating pressures of the Hope system at that point and of your system? A. It is somewhat of a normal in the winter time when the demand is heavy.

Q. You say "somewhat of a normal". You mean, generally speaking it is normal winter time operating condition. Is that right? A. No, I said—Yes, I will agree with
186 that. It is just different wording.

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Q. How many town border regulator stations do you have at Akron? I wouldn't know offhand.

187 Q. About how many? A. About two or three.

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Q. Mr. Robinson, what is the function of the lines at Akron beyond the regulator stations, beyond the town border regulator stations? A. Which lines are we talking about? The one shown on the map?

Q. No, sir, the lines in the City beyond the town-border stations you have testified to. A. Their function is to move gas into the low pressure areas, low pressure system, and then distribute it to consumers.

188 Q. In other words, to low pressure regulators. A. Yes, sir.

Q. Are the operations similar to those described by you at Cleveland? A. Identical.

Q. Is the situation the same at Youngstown? A. The general situation is carried out throughout our entire system.

Q. Do you have town border regulator stations which move the gas to the low pressure lines? A. Regulators do not move gas anywhere.

Q. Do you have town border regulator stations at Youngstown? A. Yes, sir.

Q. Beyond that point where does the gas go? A. It is distributed in the general Youngstown area and the adjacent territory.

Q. Does it go to low pressure regulators? A. Yes, sir.

Q. The same operations as at Akron and Cleveland? A. Same general operations; yes, sir.

Q. Do you have town border regulator stations at the other communities which you serve? A. Yes, sir.

Q. All of them? A. As far as I know; yes, sir.

189 Q. Do you have town border meter stations at all these towns? A. Yes, sir.

Trial Examiner: Could you clarify this information for me, Mr. Robinson: Where does your transmission end, and

where does distribution begin? At your town border meter stations? Is that where your transmission ends and your distribution begins?

The Witness: That is where our classification of accounts divided the situation; yes, sir.

Trial Examiner: So that there would be transmission lines up to the point of metering at each city gate station. Is that correct? A. Yes.

By Mr. Purdue:

Q. What is the purpose of the town border meter stations? A. Measures gas.

Q. To measure the gas delivered from the transmission pipe lines to the various local distribution areas? A. Measure the gas that moves in that area; yes, sir.

Q. In other words, the bulk volumes of gas transmitted in the transmission lines. Is that right? A. I don't know what you mean by "bulk". All gas that passes that
190 station is metered at our metering station in each community.

Q. In other words, it meters all gas that is delivered to a particular community from the transmission pipe lines? A. That is correct.

Q. Mr. Robinson, you have testified that the gas which your company receives in its Maumee line is delivered by the Panhandle Company. Is that right? A. That is correct.

Q. Do the Panhandle facilities include a 22-inch line extending from the State of Indiana into the State of Ohio? A. It includes a large pipe line. I would not say right now whether it is a 20 or 22-inch line.

Q. Do the Panhandle facilities also include a 16-inch Panhandle line extending from a point of connection with the larger Panhandle line to Maumee? A. It is either a 16 or 18. I don't recall which, sir.

Q. In your gas contract with the Panhandle Company dated February 4, 1943, which I believe is Panhandle FPC

No. 61 rate schedule, it is stated as follows at page 1, commencing in the middle of the third paragraph:

"Michigan Gas Transmission Corporation owns a
191 16-inch transmission line extending from a point on the main line near the Ohio-Michigan state line to a point near the city limits of Maumee, Ohio." A. That would satisfy me as to the size of the line.

Q. Do you happen to know this: Was the Michigan Gas Transmission Corporation an affiliate of the Panhandle Eastern Pipe Line Company, which was later absorbed by Panhandle? I believe that is the fact, but I am not sure. Do you know? A. That is my understanding; yes, sir.

Q. Continuing to read from the paragraph: "It,"—Michigan Gas Transmission Corporation,—"proposes to reinforce and increase the capacity of said transmission facilities, and that from and through such combined facilities, Eastern can assure delivery of natural gas to East Ohio at a point near Maumee, Ohio, in sufficient quantities to fulfill the requirements of this agreement."

Can you tell us in a brief way if the 16-inch line, if the capacity of the 16-inch line, was reinforced and increased at the place specified, and, if so, what was done? A. I don't think the 16-inch ever was increased or never was proposed to be increased. I think there have been some improvements, and looping has been done on their other system, on their 22 and 24-inch lines to make more gas available.
192 To my recollection I don't recall anything ever being done to the 16-inch line. However, it could be done without my knowledge.

Q. Would the effect of the main line looping be to permit increased deliveries at the Maumee connection? A. I don't know what we would have to do with it. We have a definite contract with Panhandle to furnish fifty million cubic feet per day.

Q. Well, I will read you the following language again, and I will ask you what was the purpose of the provision:

"That is",—Michigan Transmission Corporation,—"proposes to reinforce and increase the capacity of said transmission facilities, and that from and through such combined facilities Eastern can assure delivery of natural gas to East Ohio at a point near Maumee, Ohio, in sufficient quantities to fulfill the requirements of this agreement." A. That was just an assurance that there would be sufficient gas there for our use.

Q. Particularly on peak days? A. No. We have never been able to get from Panhandle any additional gas on peak days more than the fifty million cubic feet.

Q. Well, the effect of the looping was to insure delivery of increased quantities on peak days, was it not? A. I think not, sir.

Q. Of the contract quantity? A. No; I don't think
193 so.

Q. Mr. Robinson, is the main Panhandle line as to which you testified, being a 20 or 22 inch line—is there any difference between that line on the Indiana side of the state boundary and on the Ohio side of the state boundary? A. I did not see it constructed but I would think it would be identical.

Q. Does the gas flow along the main line at that point without interruption? A. As far as I know it does.

Q. Is there any interruption of the natural gas at Maumee where it is delivered to you by Panhandle? A. Yes, sir.

Q. What does that consist of? A. Regulation.

Q. What is the nature of the regulation. A. The gas we receive from Panhandle is so regulated that we get a constant volume of gas throughout the day. Therefore, as our demands build up on an hourly basis it automatically picks that up. In order to do that there must be pressure held back of the regulator where we get our gas.

Q. The gas which you receive from Panhandle moves without stopping, does it not, from the Panhandle facilities into your Maumee line? A. Well, there is some pres-

194 sure built back of the regulator. Something has to build up that pressure. Practically all of the gas moves continuously through there. There is a build-up of pressure in order to take care of the flow which has to hold some gas back.

Q. And does that gas move into your Maumee line continuously 24 hours a day, day in and day out? A. Yes, sir.

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195 Q. Your company has no compressor station along the route of your Maumee line, does it? A. No, sir; it has not.

Q. Is any gas received into that line other than the gas which you get from Panhandle? A. I believe not, sir.

Q. On page 3 of your application in Docket No. G-458, paragraph "D", the following statement is made:

"As shown on Exhibit "C", said pipe line"—that is the Maumee line—"is to be used solely for the purpose of bringing in an additional supply of gas to applicant's Medina line extending to Cleveland and to applicant's Brush Farm station." Then it continues—Is the line as operated by you used solely for that purpose, namely the purpose of bringing in an additional supply of gas to your Medina line extending to Cleveland, and to your Brush Farm station? A. It does.

Q. It is? A. Is and does.

Q. What are the functions of the Valley City regulator station? A. The function of the Valley City regulator station is to control the flow of gas that goes north through our Medina line into the City of Cleveland.

196 Q. It does not regulate the gas flowing through to Brush Farms? A. Yes, sir; we pinch it back in order to force more through that line.

Q. Those are the only operations performed by that regulator station? A. Yes.

Q. You testified on direct examination, Mr. Robinson, to a number of respects in which your company is subject to

regulation by the Ohio Public Utilities Commission. Does the Ohio Public Utilities Commission require your company to file either a reclassification of accounts or original cost studies? A. At the present time we are working on the reclassification of accounts in accordance with permission from the Ohio Commission. They have not required the filing of original cost.

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197 Q. Were you required to file an application for a certificate of public convenience and necessity for the Maumee line with the State Commission, either for that line or for the line for which you applied in G-695? A. No, sir. Before construction I went down and explained in detail to the Commission our plans and our schedule of construction.

Q. But you were not required to do that, were you, Mr. Robinson? A. No, sir, except I only thought it was good business to do it.

Trial Examiner: May I ask for an explanation of that statement?

The Witness: They are always anxious to know what we are doing, and in a great many cases we have conferred with them on our plans before they develop. On many of them we go to them to get definite approval, and some we do not. But we endeavor to keep closely in touch with them and advise them as to our major operations. They have always been very much appreciative of it.

198 Trial Examiner: In other words, they appreciate the voluntary information which you give them.

The Witness: Yes, sir.

Trial Examiner: You do not believe it is a matter of obligation on your part to do so.

Mr. Cockley: It is a matter of obligation on our part to furnish them any information they may request, Mr. Examiner, and they have quite wide authority under the statutes which I shall inquire about. And they do that frequently.

Trial Examiner: In any event, no formal application is necessary and you did not file any?

The Witness: That is correct, sir.

Trial Examiner: All right.

By Mr. Purdue:

Q. Mr. Robinson, you testified on direct examination that the gas at the Maumee connection with the Panhandle was received ordinarily at a certain pressure. What was that figure? A. Maximum pressure we have received gas at that connection is 320 pounds. Our contract obligation of Panhandle is to furnish it up to 350 pounds.

Q. At what pressure do you ordinarily receive it, approximately? A. It depends on the demands on our sys-
tem at the other end. Because as we get a terriffic
199 pull in our line going from Brush Farm north, that
pressure becomes somewhat lower. Consequently, Panhandle has to regulate their pressure in order to give us fifty million a day. So that is a variable throughout the day.

I would say the normal operating pressure would be in the neighborhood of 300 pounds.

Q. When the pressure at the East Ohio connection with Panhandle at Maumee is 300 pounds, what is the pressure in the Panhandle 22-inch line at the point of connection with the 16-inch line? A. I would not know, sir. It is somewhat in excess of 320 pounds.

Q. What is the pressure at the Valley City? A. That varies, of course, as the operations—the normal pressure at Valley City ranges between 175 and 200 pounds.

Q. Is that coming in to Valley City? A. That is right.

Q. Now, when pressure is 300 pounds at the Panhandle East Ohio connection, what is the pressure at the Brush Farm connection? A. That varies quite materially. The average would be around 160 to 185 pounds.

Q. In other words, there is very little regulation at Valley City of the gas going through to Brush Farm?

200 Mr. Cockley: I object to it. He stated exactly what is done at Valley City. There is no necessity for general comment about it.

Trial Examiner: I will overrule the objection.

The Witness: Just such regulation as is necessary to force through our Medina line the amount of gas that we desire to locate in the western part of Cleveland.

By Mr. Purdue:

Q. Mr. Robinson, do the figures on statement No. 7 of Exhibit I-2, to your application in G-458, as to the estimated pressures of the proposed pipe line from Maumee to Brush Farm—are those figures, generally speaking, the same as in the operation of the line after its installation? A. I have not looked at that report for a couple of years. I am sure I could not tell you without seeing what they are.

Q. Would you look at statement No. 7, and see if you can answer the question? A. I would say those are substantially a little lower than the actual operation. The present operations are the correct ones.

Q. At the time of filing of G-458, a statement was made in that application, or in one or more of the exhibits that there were some 773 miles, as I recall it, of transmission lines in the East Ohio system. As you testified
201 earlier today, there are at present 903 miles. Is the difference in figures occasioned by reason of the construction of the Maumee line? A. To the extent of 111.7 miles.

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208 By Mr. Purdue:

Q. I believe it appears somewhere in the record, Mr. Robinson, that a portion of the natural gas which the Hope Company delivers to your company is gas which is supplied to Hope by Tennessee Gas and Transmission Company. Can you tell me if the gas supplied by Tennessee Gas and Transmission Company is gas which originates in Texas? A. Yes, sir.

Q. That is true, is it? A. Yes, sir; near Corpus Christi.

Q. Yesterday you testified at the very bottom of page 144, and at the very top of 145,

"Question: How much of your property do you classify as a matter of accounting percentagewise as distri-
209 bution property, production and storage?" Then the next question: "Transmission?" "Ans. 27.7 per cent."

Is your property so classified in your plant account, that is between production and storage and transmission and distribution? A. Yes, sir; it is.

Q. Can you tell me in dollars as of the present time, or as of some recent time, the total amount of your plant account? A. Yes. As of December 31, 1945, the total amount was $85,066,881.01.

Q. What was the total amount in transmission plant? A. Take that percentage of that and it will give it to you.

Q. I see. Now, does your company recognize the same breakdown between transmission, production, and distribution in your operating expense accounts? A. To some extent wherever it is applicable, we have a pipe line superintendent who looks after the trunk pipe lines. We have various managers and superintendents in our various plants. A good deal of our work is done by one and by another. What I mean by that is that if there is a big job to be done in a hurry in our distribution end of it we use any men available for it. If there is a big job to be done in transmission we do the same.

210 Q. But you do have operating expense accounts for transmission, for distribution, and for production? A. Yes.

Q. At page 97 of your testimony on yesterday, commencing with line 15, you testified as follows:

"Question: While we are on it, tell us what that Petersburg delivery is used for?"

"Answer: The Petersburg delivery is used on extreme peak days to help augment the East Ohio Gas Company's supply of gas; due to lack of transportation facilities sufficient amounts of gas cannot be produced in Ohio and purchased in Ohio and moved northward through the pipe line system of Ohio to supply our local distribution demands."

What transportation facilities did you have in mind, Mr. Robinson, as being inadequate? A. I wouldn't say inadequate. They are just not sufficient. In other words, we can only get a certain amount of gas through our transmission lines moving in a northerly direction from the Hope which would meet our market requirements.

Q. You had in mind, then TPL No. 2, No. 3, 5 and so forth? A. I had all of them in mind because we cannot get the gas we have available to us. We don't have the facilities to transport it. That would be 1, 2, 3, 4, 211—5, and 6, we cannot get any more gas from Panhandle. So that is practically in the same condition.

Q. At the bottom of page 90, commencing with line 21, and continuing over to the top of page 91, you testified yesterday as follows:

"Trial Examiner: These transmission lines, these 903 miles, perform what specific function?"

"The Witness: The 903 miles of transmission line as classified, perform the function of moving gas in one case from the Ohio River northward, and in the other case from Maumee eastward of out-of-state gas as well as of gas produced and purchased in the State of Ohio, through these lines to our local distribution areas."

Would the function of those lines, Mr. Robinson, which you there described be changed if you were delivering gas at the town border stations to other distributing companies rather than to your own distribution facilities? A. I don't know what their requirement could be. If it were a requirement for more or less it naturally would be changed.

Q. Assuming the same requirements? A. No, it couldn't be any different if they were the same requirements.

Mr. Purdue: That is all.

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212 Mr. Fitzgerald: I would like to cross examine this witness, Mr. Trial Examiner. However, I believe Judge Morgan would have the privilege of cross examination before me if he so desires.

Mr. Morgan: We have no cross examination.

By Mr. Fitzgerald:

Q. Calling your attention to some of your testimony this morning, Mr. Robinson, with reference to the special permission granted to East Ohio to change their accounting system to a system of accounts similar to the Federal Power Commission, is it your understanding that your system of accounts, as it now exists or would exist after new accounts would, if they were put into effect, are still under the jurisdiction of the Ohio Public Utilities Commission? A. Yes.

Q. Is it your understanding that in the making of that application that that was a special permission to East Ohio, and not a general provision governing the other utilities in the State of Ohio? A. I didn't quite follow you. You mean, special permission from the Ohio Commission?

Q. From the Ohio Commission; yes. A. Yes, sir. As I stated this morning, we confer with them and en-

213 deavor to keep them informed on our major points.

Q. In the asking for this special permission, that permission was confined to your company alone in the order of the Public Utilities Commission? A. That is correct. It is all we ever discussed.

Q. Now, in the event that for some reason the Public Utilities Commission should withdraw their special permission, is it your understanding that your company would have to conform its accounts to the uniform system of ac-

counts now existing in the State of Ohio under the Public Utilities Commission? A. Yes, sir.

Q. Calling your attention to Exhibit 4, a map of the East Ohio operation, is it your understanding that all these transmission lines, including all the other property owned and operated by East Ohio, are at the present time under the jurisdiction of the Public Utilities Commission? A. Yes, sir.

Q. Calling your attention to a recent rate case involving the City of Cleveland and East Ohio Gas Company, which was before the Public Utilities Commission, in the course of that litigation was the East Ohio Company required to value and inventory all of the transmission properties shown on this map at the request of the Public Utilities Commission? A. Yes, sir, and inspection was done in co-operation with the engineers of the Public Utilities
214 Commission.

Q. In other words, at all times the East Ohio Gas Company has understood that these transmission lines are under not only the control but the supervision of the Public Utilities Commission? A. Yes, sir.

Q. Calling your attention to the transmission lines that run up to Gross Farms, am I correct in understanding that you mentioned yesterday that in some instances on those transmission lines in that area, leading into that one central point, that gas at certain times of the year goes in both directions, both north and south? A. The gas up as far as Gross Farm for the most part goes north; at Gross Farm our system is so flexible that we can deliver the gas from one line to another, or in most any direction we need the gas to supply a market in our general distribution area, and it is so operated that way in winter and in particular on peak days.

Q. Well, is it true that in the Gross Farm areas, I understand from the legend here, you have certain underground storage facilities? A. That is correct; outlined in dark blue.

Q. During certain portions of the year is it not true that Ohio produced gas as well as out of the state gas is stored in those storages? A. That is correct.

215 Q. And therefore transmission lines north of Gross Farm could at some time during the course of the year be carrying gas which formerly had been interstate gas as well as intrastate gas? A. As a matter of fact, the operation is that where gas comes in from the Maumee line at Brush Farm some of that gas in summertime is brought south and actually stored in the storage pool.

Q. Now, Mr. Robinson, calling your attention to some of the practical applications of the inventories, and what not, in connection with these lines, I understood you to say yesterday, I believe, that there oftentimes are great expenses involved in the valuation and inventories of these lines for the purposes of submitting that information to the Public Utilities Commission. A. Yes, sir. It all costs money.

Q. How do you handle that expense on your accounts? A. That is expense, a regular charge to expense. That is the normal work. When we have an unusually large job such as a rate case preparation or a general valuation, the Commission usually authorizes that to be amortized over a definite period of time, varying from five years for the most part.

Q. Is it your understanding that that expense is one of the items that goes into consideration of a rate for
216 municipalities in this vicinity? A. Yes, sir.

Q. In other words, that is a direct item that might materially affect the ultimate consumer rate on your system. A. Yes, sir.

Q. Is it your understanding, since these lines are under the jurisdiction of the Public Utilities Commission, that any expense in connection with any inventory, changing of accounts, and so on and so forth, regardless of where that information may be desired from, that that would be an allowable expense in a rate matter before the Public Utili-

ties Commission in which East Ohio is involved? A. Yes, sir; it would have to be.

Q. And generally, from your own knowledge the tendency of the additional expense in reference to the ultimate consumer rate, would it tend to lower or increase it? A. It would increase it, sir.

Mr. Fitzgerald: That is all.

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255 Trial Examiner: Mr. Fitzgerald, Assistant Attorney General for the Public Utilities Commission of Ohio, has requested leave to make a statement with reference to the four docket numbers on which we have just concluded taking testimony.

Mr. Fitzgerald, you may proceed to make your statement.

Mr. Fitzgerald: If it please the Examiner I would like to have the privilege of reading the statement. If I may, I would like to sit down and read it so I may expedite the hearing and not take too much time?

256 Trial Examiner: You may.

Mr. Fitzgerald: If the Examiner please, in order to elaborate on the position of the Public Utilities Commission of the State of Ohio, previously stated, I would like to say that the Ohio Commission have found the activities of the Federal Power Commission in taking over the problems of setting interstate gas rates, particularly in the instance of affiliated companies, most helpful.

In former years and in former rate cases the interstate gas rate between affiliated gas companies—where interstate gas rates between affiliated gas companies were concerned, the determination of the reasonableness of the rates proved to be a great burden on the Ohio Commission.

By the enactment of the Natural Gas Act the State Commissions were relieved of this burden, and rightly so. It is also the opinion of the Ohio Commission that the interstate gas rate between a non-affiliated company, which it could not review, should be properly subject to regulation.

Since the constitution limited such review by any State agency the Ohio Commission welcomed the Natural Gas Act and the authority of the Federal Power Commission in filling the gap in the existing essential regulatory procedure.

A cooperative jurisdictional field wherein the Federal agency regulates interstate rates and the State Commissions regulate local rates and activities present a
257 complete and harmonious regulatory system.

However, I do not believe that duplication of regulations was desired or intended by Congress in the enactment of the Natural Gas Act. In reading the legislative history as to the purpose of the Natural Gas Act it would seem to me that the intention of Congress was to avoid duplication of regulation, and likewise in no way disturb the States in the exercise of their jurisdiction.

Regulation in the utility field has proven to be an expensive enterprise, and in the long run all regulatory expense must be borne by the consumers. Any duplication of regulation would double the burden imposed upon the gas user.

As I stated at the opening of the hearing, the State of Ohio and the Public Utilities Commission of Ohio appeared before the Circuit Court of Appeals when the matter of the Federal Power Commission's jurisdiction as to East Ohio Gas Company came before the Courts.

It appeared then that the information and data which the Federal Power Commission sought would involve a substantial expense, and such information could not be helpful to the Ohio Commission in its determination of local rates under the Ohio law, which requires the rate base to be fixed at present value.

In this particular instance duplication of regula-
258 tory jurisdiction would have been generally harmful to the Northern Ohio Gas users.

As the testimony has developed at the present hearing the practical situation is the same now as in the former hearing, except that the cost to the East Ohio Gas Com-

pany to comply with the various accounting and other orders of the Federal Power Commission is much greater than in the original situation.

The Ohio Commission has from the inception of the East Ohio Gas Company regulated all of the rates, securities issued, property accounting and valuation, and all other activities in connection with the procuring, transmission and distribution of gas in the State of Ohio.

The Ohio law specifically directs the Ohio Commission to assume such regulatory jurisdiction over all of the utility property located in the State, and has empowered the Ohio Commission with authority to secure all of the information required for such regulatory purposes.

In this instance the Ohio Commission does not need the assistance of the Federal Power Commission or any Federal agency to discharge their statutory duties to the citizens of the State with reference to the East Ohio Gas Company property.

It is undisputed that the operation of East Ohio is wholly intrastate, and is confined to the production and dis-
259 tribution of natural gas in some 69 Ohio cities and adjoining communities.

For the Federal Power Commission to compel securing of additional information, and to insist upon compliance with additional future requirements as to accounting and the securing of certificates of public convenience and necessity, all at great expense, is in this instance a great disservice and burden to Ohio Gas users. It adds a substantial item to the operating expenses which to our minds is unnecesasry.

This undesirable situation could be avoided by our practical interpretation of the Natural Gas Act, which would limit the jurisdiction of the Federal Power Commission to the filling in of the gaps in State regulation, as I believe Congress clearly intended.

I am confident that Congress did not intend that the jurisdiction of the Federal agency should become dual in

connection with a purely intrastate local distribution company, such as East Ohio, and to subject such a company to dual regulation involving the same properties—once by the Ohio Public Utilities Commission under Ohio law, and again, by the Federal Power Commission.

Therefore, in view of what has just been said, the State of Ohio and the Public Utilities Commission of Ohio oppose the assumption of jurisdiction of the Federal Power
260 Commission in this instance as unwarranted and unnecessary, and no doubt illegal invasion of the powers of the State of Ohio to regulate local gas distribution utilities which powers were clearly preserved to the States under the Congressional intent and the provisions of the Natural Gas Act.

That is all I have to say on that subject.

I wish to thank you very much for the opportunity of participating in this hearing.

Trial Examiner: You are entirely welcome, Mr. Fitzgerald, I assure you.

Your statement, of course, is tantamount to an argument on the issues and the evidence in this hearing we have held so far.

I wish to give counsel for the parties an opportunity to likewise express their views in oral argument on the evidence and issues in the docket numbers we have just concluded hearing.

Mr. Dougherty?

Mr. Dougherty: If the Examiner please, I think in the interest of conserving time that any extended oral argument by counsel on this particular section of these proceedings would not be particularly helpful. It would seem to me that at the close of the four dockets if it is desired to file briefs that matter may be considered then, or oral argument as might seem best to the Examiner or
261 counsel.

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Excerpts from Testimony and Proceedings of Hearing on Docket No. G-458, Held April 21, 1943.

3153 **J. French Robinson,** a witness called on behalf of the Applicant, having been first duly sworn, was examined and testified as follows:

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3186 Cross-examination

By Mr. Reeder:

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3192 Q. Do you have load dispatchers in The East Ohio Gas Company? A. We have a gas dispatcher.

Q. Where does he operate? A. His office is in our main building, Cleveland, Ohio.

Q. Will you describe his operations? A. The duty of the gas dispatcher is to supply all of our markets with gas as nearly all of the time as we can. He is in constant touch with our field superintendents in relation to turn-
3193 ing off wells of our own and gas purchase contracts in the State of Ohio. He is in constant touch with the dispatcher of the Hope Natural Gas Company in regard to pressures, and we operate mainly by pressure, which in turn controls volumes, as required, and as can be had. Those are the principal duties of our gas dispatcher.

* * * * * * * * * *

3204 Q. Will you state how far north of those lines running out of the Pipe Creek station and Clarington station carry nothing but Hope gas? A. The first intermingled Ohio gas occurs in the western portion of Harrison County, which would be roughly forty miles north of Clarington station.

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3206 Q. Now, Mr. Robinson, is some gas sent to the eastward out of Gross Farm station to Marion, Niles and Youngstown? A. Yes, sir.

Q. And is that all Hope gas, with the exception
3207 of a small amount of Ohio gas that is mingled with it south of Gross Farm station as you have described? A. Yes, sir.

Q. And what is the usual pressure in that 14-inch and that 16-inch Youngstown branch? A. The operating pressure of those lines varies between about 150 pounds and 185 pounds at the Gross Farm.

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3210 Q. Mr. Robinson, will you state what pressures are maintained in the East Ohio transmission lines from Gross Farms Station north to the Cleveland city gate, as a matter of the usual and ordinary course of business? A. That varies from between 150 pounds at Gross Farm, to 100, possibly a little above 200 pounds, reaching an average pressure in the border stations, varying between 60 and 100 pounds, at Cleveland.

Q. What are these border stations? A. Border stations are the points where the gas from the transmission
3211 line is passed over into the high pressure distributing lines.

Q. Are these border stations measuring stations? A. Not necessarily. I am speaking of border stations, as regulating stations. We do have measuring stations at our border stations, too.

Q. And I believe you testified that there is a Cleveland Division high pressure distribution system. Will you describe what that is? A. That is nothing more than a system of pipe lines, running around the outskirts of Greater Cleveland, and through the city which carries the high pressure distribution gas to points throughout the area where it is converted to low pressure distribution.

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Q. And will you state what pressure is maintained after the gas gets into the high pressure distribution system? A. It varies between 30 and 50 pounds, normally.

Mr. Cockley: Are you now talking about merely the Cleveland area, or the whole system?

The Witness: The Cleveland area, I understood that is what we were discussing.

* * * * * * * * * *

3212 Q. Mr. Robinson, what is the pressure in the low-pressure distribution main? A. Approximately 6 ounces between, 4 and 6 ounces.

Q. I understood you to testify that in the high pressure distribution systems, the pressure was about 50 or 60 pounds.

Did I misunderstand? A. That is correct. 30 to 60 pounds, you might say.

Q. And then, when you get into the low pressure distribution system, what is the pressure? A. 4 to 6 ounces.

Q. There is a substantial reduction in pressure then, between the high pressure distribution system, and
3213 the consumers burners, is there not? A. That is where it goes, that is where the major cut is made down to where it goes into the low pressure distribution system.

Q. And will you describe the equipment or facilities which reduce the pressure from 30 to 60 pounds, in the high pressure distribution systems, to 6 ounces in the low pressure distribution systems? A. That is done by a device, known in the industry as regulator, or regulators, as the case may be. Sometimes it takes more than one regulator to cut the pressure down. You see, they are set automatically, the regulator receives the gas on one side of it, at various pressures, and it lets it out on the other side, at whatever is set for, 4 to 6 ounces, and it is purely mechanical, or automatic.

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3214 Q. What is the pressure maintained in the 14 and 16 inch Youngstown branch lines, running northeastward from Gross Farm to the Youngstown area? A. That varies. I think I stated a little while ago that that pressure was around 150 to 175 pounds.

Q. And when— A. (Interposing) At the Gross Farm.

Q. Yes, and when that gas purchased from the Hope Company and moving eastward out of Gross Farm reaches the Youngstown area, is there a Youngstown high pressure

distribution system similar to that which you have described for the Cleveland area? A. Yes, sir.

Q. And that pressure is maintained in that system? A. Approximately the same as in the Cleveland system.

3215 Q. And is there a low-pressure Youngstown distribution system similar to that in the Cleveland area? A. Yes, sir.

Q. And now will you describe the movement of gas purchased from the Hope Natural Gas Company, northward from Gross Farms Station to the border of the city of Akron, for the Akron area? A. It is similar to the movement not only of Hope gas, but of commingled gas from Gross farms north to the border stations in and around Akron, just the same as for Cleveland.

Q. And there is a high pressure Akron distribution system is there? A. That is correct.

Q. And then, a low pressure Akron distribution system, similiar to those in the Cleveland and Youngstown area? A. Yes, sir; that is our standard practice of operation.

* * * * * * * * * *

3219 Q. Now, what is the volume of gas purchased from Hope which is transmitted through trunk pipe lines 2, 3, 4, and 5, on a peak day? A. Approximately 200,000,000 feet of gas pass through these lines.

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3220 Q. Mr. Robinson, will you describe the flow of gas from the Hastings station to the city gate of Cleveland on a typical peak day?

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3221 The Witness: I don't know what you mean by "describe it", Mr. Reeder.

As I have previously stated, Hastings discharges gas at about 330 pounds pressure. The gas then moves in a westerly direction through the Hope Lines, and the East Ohio Lines from the Ohio River,—moves that gas northward from the Gross Farm, where, on a peak day, it normally

is not restricted at all, because we need all the capacity we have, and it goes on past Gross Farm, portions of it commingled with Ohio gas, to the distribution centers in Cleveland, as previously described, by going through the high pressure systems first, and then from the high pressure systems into the low pressure systems and then on to the various consumers.

By Mr. Reeder:

Q. Well, Mr. Robinson, is it a fact that the movement is continuous from the places of production or gathering in West Virginia to the Cleveland City Gate, where the pressure of the gas is reduced for distribution? A. Yes, sir; gas moves in a continuous process. It is not stopped dead at any point that I know of.

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3230 Cross Examination

By Mr. Spohn:

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3235 Q. I believe you referred the other day to your main transmission lines, as "trunk lines"? A. Yes, sir; they are quite often called "trunk pipe lines".

Q. And those are the statements, I believe, you made in your testimony from certain lines you referred to as high pressure distribution lines? A. That is correct.

Q. And a third category I believe you mentioned is low pressure lines? A. That is correct. Those are in accordance with the methods of bookkeeping and so designated as transmission lines or trunk pipe lines and high pressure distribution systems and low pressure distribution system.

Q. You keep your accounts according to those
3236 functions? A. Yes, sir.

Q. Are your operating personnel so grouped also? A. To some extent. The East Ohio Gas Company trunk pipe line system is manned, by specific groups of men.

The low pressure distribution, and the high pressure distribution is, for the most part, handled by the same personnel.

There is, at times, overlapping. We get into trouble on the main line and the personnel of the distribution system will assist, and if something happens to a distribution system near the main line, that force will assist, so that while they are more or less separate groups, there is an overlapping there.

Q. In time of emergency need, you call in all your personnel? A. Not only emergency, whenever anything happens whichever is the most economical or convenient to use, we use them.

Mr. Spohn: In the ordinary course of events, you have permanent crews and other personnel for the truck system, and others for the high pressure distribution or low pressure distribution systems?

The Witness: That is fundamentally correct.

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Exhibit No. 1: Item 1, at Hearing on Docket No. G-115 et al.

1513 — UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Commissioners: Clyde L. Seavey, Chairman; Claude L. Draper, Basil Manly, Leland Olds, John W. Scott.

September 6, 1939.

ORDER NO. 63

Order Prescribing Form of Financial and Statistical Report For Natural-Gas Companies as Defined in the Natural Gas Act (52 Stat. 821)

The Federal Power Commission, acting pursuant to authority granted by the Natural Gas Act, particularly Sections 10(a) and 16 thereof, and finding such action necessary and appropriate for carrying out the provisions of said Act,

(1) Hereby adopts, promulgates and prescribes for use of natural-gas companies as defined in the Natural Gas Act (52 Stat. 821) the accompanying form of Financial and Statistical Report, designated as F.P.C. Form No. 133 and comprising

General Instructions
Excerpts from the Natural Gas Act
Corporations Controlled by Respondent
Corporate Controlled Over Respondent
Officers and Directors
Security Holders and Voting Powers
Comparative Balance Sheet
Investments in Associated Companies
Capital Stock
Long-Term Debt Outstanding (Bonds and Long-Term Notes)
Advances from Associated Companies (Long-Term)
Utility Plant
Income and Earned Surplus Account
1514 Gas Operating Revenues
Gas Operating Expenses
Sales of Gas—By Communities
Sales to Other Gas Utilities
Gas Purchased
Gas Transported for Others
Gas Produced, Purchased, and Disposed of
Natural Gas Land Acreage
A. Natural Gas Land Acreage
B. Estimated Reserves by Fields
Number of Gas and Oil Wells
Compressor and Booster Stations
Gathering Mains
Transmission Mains
Natural Gas Production Statistics
Verification; and

(2) Hereby *orders* that each natural-gas company as defined in the Natural Gas Act (52 Stat. 821) shall file

shall be subdivided so as to show the amounts applicable to (a) gas plant in service, (b) gas plant leased to others, and (c) gas plant held for future use.

1717 The procedure followed in determining the original cost of the gas plant acquired as operating units or systems shall be described in sufficient detail so as to permit a clear understanding of the nature of the investigations and analyses which were made for that purpose.

Where estimates are used in arriving at original cost or the amount to be included in Account 100.5, a full disclosure of the method and underlying facts shall be given. The proportion of the original cost of each acquisition which has been determined from actual recorded costs and the proportion estimated shall be shown for each functional class of plant. In addition there shall be furnished in respect to each predecessor or vendor company for which complete construction costs are not available, a description of such plant records as are available, including the years covered thereby.

Statement C showing any amounts arrived at by appraisals, recorded prior to January 1, 1940, in the gas plant accounts (and not eliminated) in lieu of cost to the reporting company. This statement should describe the appraisal and give the complete journal entry at the time the appraisal was originally recorded. If the entry had the effect of appreciating or writing-up the gas plant account, the amount of the appreciation or write-up should be traced, by proper description and explanation of changes, from the date recorded to January 1, 1940.

Statement D showing in detail as of December 31, 1939, gas plant as classified in the books of account immediately prior to reclassification, including under appropriate descriptive headings, any unclassified amounts applicable jointly to the gas department and other departments of the utility.

Gas Act (52 Stat. 821) which are included in Classes A and B as defined in the Commission's Uniform System of Accounts Prescribed for Natural Gas Companies subject to the provisions of the Natural Gas Act, for the year 1941, the accompanying form of Annual Report designated as FPC Form No. 133 (1941).

(2) Hereby *orders* that each natural-gas company, as defined in the Natural Gas Act (52 Stat. 821) which is included in Classes A and B as defined in the Commission's Uniform System of Accounts Prescribed for Natural Gas Companies subject to the provisions of the Natural Gas Act, shall file with the Commission an original and two conformed copies, duly executed, of such Annual Report on the aforesaid form FPC Form No. 133 (1941), for the year 1941, said Annual Report to be filed on or before the last day of the third month following the close of the calendar year or other established fiscal year.

(3) The Secretary of the Commission shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

LEON M. FUQUAY,
Secretary

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with the Commission three executed copies of such Financial and Statistical Report on the aforesaid form (F.P.C. Form No. 133) for the year 1939, said report to be filed on or before February 29, 1940.

By the Commission.

LEON M. FUQUAY,
Secretary.

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Exhibit No. 1: Item 5, at Hearing on Docket No. G-115 et al.

1539 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Commissioners: Clyde L. Seavey, Chairman; Claude L. Draper, Basil Manly, Leland Olds, John W. Scott.

November 3, 1939.

ORDER NO. 69

In the Matter of:

Uniform System of Accounts to be Prescribed for Natural-Gas Companies Subject to the Provisions of the Natural Gas Act

Docket No. G-137

Order Prescribing a System of Accounts for Natural-Gas Companies Under the Natural Gas Act

It appearing to the Commission that:

(a) Section 8(a) of the Natural Gas Act authorizes the Commission to prescribe a system of accounts to be kept by natural-gas companies and to classify such natural-gas companies and prescribe a system of accounts for each class;

(b) Copies of a tentative draft, dated May 15, 1939, of a uniform system of accounts to be prescribed for natural-gas companies subject to the provisions of the Natural Gas Act, were, on June 20, 1939, sent by the Commission to State commissions, natural-gas

Statement E showing the adjustments necessary to state, as of January 1, 1940, Account 100, Gas Plant, including its subaccounts, Account 107, Gas Plant Adjustments, and amount of common utility plant includible in Account 108, Other Utility Plant, as prescribed in the Uniform System of Accounts.

Statement F showing gas plant (balance sheet Account 100) as of January 1, 1940, classified according to the subaccounts and the detailed accounts thereunder prescribed in the Uniform System of Accounts, effective on that date, and showing also the amount includible in Account 107 Gas Plant Adjustments, and the amount of common utility plant includible in Account 108, Other Utility Plant.

Statement G showing a comparative balance sheet, as of January 1, 1940, reflecting the accounts and amounts appearing in the books before the adjusting entries have been made and after such entries shall have been made. The balance sheet shall be classified by the accounts set forth in the Uniform System of Accounts Prescribed for Natural Gas Companies.

Statement H giving a suggested plan for depreciating, amortizing, or otherwise disposing of, in whole or in part, the amounts, as of January 1, 1940, includible in Account 100.5, Gas Plant Asquisition Adjustments, and Account 107, Gas Plant Adjustments.

Statement I furnishing the following statistical information relative to gas plant:

Production Plant

Manufactured Gas

Show separately for each producing plant the name and location of plant, date of original construction, type of plant (whether coal gas, coke ovens water gas, etc.), rated 24-hr. capacity in m.c.f. of each unit and of the total plant, and date of installation of each unit installed after original construction. Show also the

Exhibit No. 1: Item 21, at Hearing on Docket No. G-115 et al.

1841 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Commissioners: Leland Olds, Chairman; Claude L. Draper, Basil Manly, John W. Scott and Clyde L. Seavey.

March 3, 1942

ORDER NO. 69-A

Prescribing Accounting With Respect to Account 100.5,* Gas Plant Acquisition Adjustments

The Commission, having under consideration the matter of uniform systems of accounts, particularly the text of Account 100.5,* Gas Plant Acquisition Adjustments, of the Commission's Uniform System of Accounts Prescribed for Natural Gas Companies by order of the Commission adopted November 3, 1939; and

It appearing to the Commission that:

(a) Gas Plant Accounts Instruction 2-A of the said Uniform System of Accounts provides that each utility** shall classify its gas plant in accordance with the Gas Plant Accounts as prescribed in said Uniform System of Accounts;

(b) Instruction 2-C of said Gas Plant Accounts provides that the detailed Gas Plant Accounts of each utility shall be stated on the basis of cost to the utility of gas plant construction by it and on the basis of original cost, estimated if not known, of gas plant acquired by it as an operating unit or system; and further, that the difference between the original cost as above, and the cost to the utility of gas plant includible in

*Account 100.5 for Classes A and B Natural Gas Companies as hereinafter used refers also to Accounts 1100.5 and 2100.5 for Classes C and D Natural Gas Companies. Likewise other account references for Classes A and B Natural Gas Companies apply also to comparable accounts for Classes C and D Natural Gas Companies.

**The term "utility" as used herein means any natural gas company to which the Commission's Uniform System of Accounts is applicable.

companies and other interested persons and organizations, and comments and suggestions with respect thereto were requested to be filed with the Commission on or before July 10, 1939;

(c) The Commission received comments and suggestions with respect to said tentative draft from certain State commissions, natural-gas companies and others;

(d) On September 6, 1939, the Commission adopted an order in Docket No. G-137 fixing September 27, 1939, as a date for hearing for the purpose of receiving evidence with respect to the adoption of the proposed uniform system of accounts for natural-gas companies from any State commission, natural-gas company, or person, corporation or organization having an interest in the matter;

(e) Said order of September 6, 1939, was sent by the Commission to State commissions, persons engaged in the natural-gas business and other persons and organizations, and a copy thereof was duly published in the Federal Register in the issue of September 12, 1939;

1540 (f) A public hearing in this matter was held on September 27 and 28, 1939, before the Commission sitting *en banc,* and oral and documentary evidence was duly received from the Comimssion's staff, State commissions, a Committee representing the American Gas Association, representatives of the natural-gas industry and others; and memorandum briefs were subsequently filed by representatives of the natural-gas industry pursuant to permission granted at said hearing;

The Commission, having considered the record made in this proceeding by oral and documentary evidence and briefs filed, and acting pursuant to authority granted by the Natural Gas Act (52 Stat. 821), particularly Sections

Accounts 100.1 to 100.4, inclusive, after giving effect to the depreciation, depletion or amortization recorded by the accounting utility at the time of acquisition, shall be recorded in Account 100.5, Gas Plant Acquisition Adjustments.

1842 (c) Subdivision C of Account 100.5, Gas Plant Acquisition Adjustments, provides as follows:
The amounts recorded in this account with respect to each property acquisition shall be depreciated, amortized, or otherwise disposed of, as the Commission may approve or direct.

The Commission *finds* that:

(1) Studies of original cost, as provided for in paragraph (a) above, are being completed by utilities and amounts entered in the appropriate primary Gas Plant Accounts in accordance with Instruction 2-C above referred to, or will be so entered in said accounts in the near future;

(2) It is appropriate to consider the matter of disposition of such amounts as may be lodged in said Account 100.5, Gas Plant Acquisition Adjustments; and

The Commission *orders* that:

(A) Debit amounts in Account 100.5, Gas Plant Acquisition Adjustments, may be charged to Account 414, Miscellaneous Debits to Surplus, in whole or in part, or may be amortized over a reasonable period by charges to Account 537, Miscellaneous Amortization, without further order of the Commission;

(B) Should a utility desire to account for debit amounts in Account 100.5, Gas Plant Acquisition Adjustments, in any manner different from that indicated in (A) above, it shall petition the Commission for authority to do so,

(C) Debit balances shall not be determined by application of credit amounts thereto;

original cost according to the System of Accounts for each plant, by Accounts 311 to 325, inclusive.

Natural Gas

For each "field" includible in Account 100.1, Gas Plant in Service, furnish the number of acres each of gas producing lands owned, of gas producing lands leased by the company, and of land on which gas rights only are owned, as included in Accounts 330.1,
1718 330.2, 330.3, respectively. The same information,
classified by subaccounts, shall be furnished for producing and nonproducing acreage includible in Account 100.2, Gas Plant Leased to Others, and in Account 100.4 Gas Plant Held for Future Use.

For each "field" state number of feet of each size pipe used in Field Gathering Lines.

For each "field" state number of wells included in Accounts 332.1 and 332.2, segregating to show the number of wells on each type of producing lands classified under Accounts 330.1, 330.2, 330.3.

When pumping or compressing plants exist within the Production Plant, include the same information as that requested for Compressor Stations under Transmission Plant.

State type and character of Purification Equipment and Residual Refining Equipment included in Accounts 335 and 336, respectively.

Show the original cost according to the System of Accounts for natural gas production plant by each "field" and by Accounts 330.1 to 337.

Storage Plant

Show separately for each location the name of plant, date of construction, type and total capacity (m.c.f.) of each gas holder. State also the original cost according to the System of Accounts for each location, by Accounts 341 and 342.

If depleted gas fields are being repressed, the statements furnished shall reflect the number of acres in-

8(a), 10(a) and 16 thereof, and finding such action necessary and appropriate for carrying out the provisions of said Act, *orders* that:

(A) The accompanying system of accounts, entitled "Uniform System of Accounts Prescribed for Natural-Gas Companies Subject to the Provisions of the Natural Gas Act," and the rules and regulations contained therein, be and they are hereby adopted;

(B) Said system of accounts and said rules and regulations contained therein be and the same are hereby prescribed and promulgated as the system of accounts and rules and regulations of the Commission to be kept and observed by natural-gas companies subject to the jurisdiction of the Commission, to the extent and in the manner set forth therein;

(C) Said system of accounts and rules and regulations therein contained shall, as to all natural-gas companies now subject to the jurisdiction of the Commission, become effective on January 1, 1940, and as to any natural-gas company which may hereafter become subject to the jurisdiction of the Commission, they shall become effective as of the date when such natural-gas company becomes subject to the jurisdiction of the Commission;

(D) A copy of said system of accounts and rules and regulations contained therein be forthwith served upon each person which may be subject to the jurisdiction of the Commission under the Natural Gas Act;

(E) The Secretary of the Commission shall cause this order and the system of accounts prescribed thereby to be forthwith published in the Federal Register.

By the Commission.

LEON M. FUQUAY,
Secretary.

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volved and the original cost according to the System of Accounts (Accounts 341 and 342).

Transmission Plant

State the number of feet of each size of main.

State separately for each compressor boosting station the name of plant, location, date of original construction, rated capacity, type and character of power unit and rated capacity and type of compressor units. Also state the capacity, type and date of installation of each additional power or compressor unit. Show for each station the original cost according to the System of Accounts by Accounts 351, 352 and 354 and by prescribed subaccounts.

Distribution Plant

State number of feet of each size of main and the number of active meters, house regulators and services. Give a general description of the district regulators and the number, by sizes.

Where pumping or compressor stations exist within the distribution plant, include the same information requested for similar stations under transmission plant.

General Plant

Describe the principal structures and improvements.

State the number and type of transportation vehicles and appurtenant equipment.

Give a description of store, shop and laboratory equipment and miscellaneous equipment.

Furnish maps, drawn to scale, upon which indicate transmission mains, location of production plants (artificial and natural), producing and nonproducing leaseholds (indicating thereon producing wells, dry holes and depleted wells), gathering systems, booster and compressor stations, communities served (noting as to wholesale or retail) and large industrial consumers. Where gas is purchased from or sold to other gas

(D) Credit amounts in Account 100.5, Gas Plant Acquisition Adjustments, shall be accounted for as directed by the Commission;

(E) Where a utility, subject to both Federal and State regulations, petitions the Commission in accordance with paragraph (B) above, the cooperative procedure heretofore adopted between Federal and State Commissioners shall be invoked;

(F) Disposition of amounts in Account 100.5, Gas Plant Acquisition Adjustments, as above directed, is for accounting purposes only and such disposition shall not be construed as determining or controlling the
1843 consideration to be accorded these items in rate or other proceedings, nor shall anything contained herein prevent the Commission from subsequently ordering the amounts to be charged directly to Account 414, Miscellaneous Debits to Surplus, or from modifying the adopted amortization period.

By the Commission.

LEON M. FUQUAY,
Secretary

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Exhibit No. 2: Item 1, at Hearing on Docket No. G-115 et al.

1965 UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Commissioners: Leland Olds, Chairman; Claude L. Draper, Basil Manly, John W. Scott and Clyde L. Seavey.

November 24, 1942

ORDER NO. 100

Order Prescribing Form of Annual Report for Natural-Gas Companies (Classes A and B), FPC Form No. 133

The Federal Power Commission, acting pursuant to authority granted by the Natural Gas Act (52 Stat. 821), par-

Exhibit No. 1: Item 8, at Hearing on Docket No. G-115 et al.

1716 UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Commissioners: Leland Olds, Chairman; Claude L. Draper, John W. Scott, Clyde L. Seavey. Basil Manly, not participating.

April 9, 1940

ORDER NO. 73

Order Requiring Submission of Supplemental Data in Connection With Gas Plant Instruction 2-D of the Uniform System of Accounts Under the Natural Gas Act

It appearing to the Commission:

(1) That Gas Plant Instruction 2-D of the Uniform System of Accounts Prescribed for Natural Gas Companies, provides as follows:

> "D. Not later than two years after the effective date of this system of accounts, each utility shall have completed the studies necessary for classifying its gas plant as of the effective date of this system of accounts in accordance with the accounts prescribed herein and it shall submit to the Commission the entries it proposes to make to carry out the provisions of this instruction. It shall submit, also, a comparative balance sheet showing the accounts and amounts appearing in its books as of the effective date of this system of accounts and the accounts and respective amounts as of the same date after the proposed entries shall have been made."

(2) That it is necessary in the public interest in carrying out the provisions of the Natural Gas Act and desirable in order to consider adequately the adjusting entries specified in the above-named instruction that data can be furnished relative to the history of each natural gas company, its acquisitions of gas operating units or systems, the

ticularly Sections 10(a) and 16 thereof, and finding such action necessary and appropriate for carrying out the provisions of said Act, *orders* that:

(1) The accompanying FPC Form No. 133, Annual Report for natural-gas companies, as defined in the Natural Gas Act, which are in Classes A and B, as defined in the Commission's Uniform System of Accounts Prescribed for Natural Gas Companies, subject to the provisions of the Natural Gas Act, be and the same hereby is approved;

(2) Each natural-gas company which is in Class A or B shall file with the Commission an original and two conformed copies, duly executed, of such Annual Report, FPC Form No. 133, for the year 1942 and each year thereafter; said Annual Report is to be filed on or before the last day of the third month following the close of the calendar year, or other established fiscal year;

(3) The Secretary of the Commission shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

FEDERAL POWER COMMISSION
G-115, 399, 400, 401, 695, 696
LEON M. FUQUAY,
Secretary

* * * * * * * * * *

utilities, indicate location of measuring stations or gates. If scale maps are not available, furnish sketch maps upon which should be indicated approximate distances between the locations above specified.

By the Commission.

LEON M. FUQUAY,
Secretary

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Exhibit No. 1: Item 11, at Hearing on Docket No. G-115 et al.

1721 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Commissioners: Leland Olds, Chairman; Claude L. Draper, Basil Manly, John W. Scott and Clyde L. Seavey.

January 14, 1941

ORDER NO. 80

Order Prescribing Form of Financial and Statistical Report for Natural-Gas Companies as Defined in the Natural Gas Act (52 Stat. 821), (Classes A, B, C, and D), FPC Form No. 133 (1940)

The Federal Power Commission, acting pursuant to authority granted by the Natural Gas Act, particularly Sections 10(a) and 16 thereof, and finding such action necessary and appropriate for carrying out the provisions of said Act,

(1) Hereby adopts, promulgates and prescribes for use of natural-gas companies as defined in the Natural Gas Act (52 Stat. 821) which are included in Class A, B, C, or D as defined in the Commission's Uniform System of Accounts prescribed for natural-gas companies subject to the provisions of the Natural Gas Act, for the year 1940 the form of Financial and Statistical Report, designated as FPC Form No. 133, adopted and prescribed for the year 1939 by Commission Order No. 63, dated September 6, 1939.

original cost thereof, the amounts entered in the books in respect thereto, the method of determining original cost, and other related information.

It is ordered:

That in submitting the information called for in Gas Plant Instruction 2-D of the Uniform System of Accounts for Natural Gas Companies each company shall furnish, insofar as applicable, the following statements, in triplicate, on paper cut or folded to 8½ inches wide by 11 inches long, and properly sworn to by the officer in responsible charge of their compilation:

Statement A showing the origin and development of the company, including, particularly, a description (giving names of parties and dates) of each consolidation and merger to which the company, or a predecessor, was a party and each acquisition of a gas operating unit or system. Any affiliation existing between the parties shall be stated.

Statement B showing for each acquisition of a gas operating unit or system by the reporting company or any of its predecessors: (1) the original cost (estimated only if not determinable from existing records), (2) the cost to the acquiring company, (3) the amount entered in the books as of the date of acquisition, (4) the difference between the original cost and the amount entered in the books, (5) a summary of all transactions affecting such difference, including retirements, between the date of each acquisition and January 1, 1940, and (6) the amount of such difference remaining at January 1, 1940.

If the depreciation, retirement or amortization reserve was adjusted as of the date of acquisition and in connection therewith, a full disclosure of the pertinent facts shall be made.

The amount to be included in Account 100.5, Gas Plant Acquisition Adjustments, as of January 1, 1940,

Exhibit No. 2: Item 2, at Hearing on Docket No. G-115 et al.

1966 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Commissioners: Leland Olds, Chairman; Claude L. Draper, Basil Manly, John W. Scott and Nelson Lee Smith.

December 21, 1943

ORDER NO. 113

Order Prescribing Form of Annual Report for Natural-Gas Companies, as Defined in the Natural Gas Act (52 Stat. 821), (Classes A and B), FPC Form No. 2

The Federal Power Commission, acting pursuant to authority granted by the Natural Gas Act, particularly Sections 10(a) and 16 thereof, and finding such action necessary and appropriate for carrying out the provisions of said Act, *orders* that:

(1) The form of Annual Report for natural-gas companies as defined in the Natural Gas Act (52 Stat. 821) which are included in Classes A and B as defined in the Commission's Uniform System of Accounts Prescribed for Natural Gas Companies subject to the provisions of the Natural Gas Act, heretofore adopted and designated as FPC Form No. 133, by Commission Order No. 100, dated November 24, 1942, including the instructions and schedules therein contained, be and the same is hereby readopted and redesignated as FPC Form No. 2;

(2) Each natural-gas Company as defined in the National Gas Act (52 Stat. 821) which is included in Classes A and B as defined in the Commission's Uniform System of Accounts Prescribed for Natural Gas Companies subject to the provisions of the Natural Gas Act, shall hereafter, file with the Commission annually for each year beginning January 1, 1943, or next thereafter (if the established fiscal year is other

(2) Hereby orders that each natural-gas company as defined in the Natural Gas Act (52 Stat. 821) which is included in Class A, B, C, or D as defined in the Commission's Uniform System of Accounts prescribed for natural-gas companies subject to the provisions of the Natural Gas Act, shall file with the Commission three executed copies of such Financial and Statistical Report on the aforesaid form (FPC Form No. 133) for the year 1940, said report to be filed on or before March 31, 1941.

(3) The Secretary of the Commission shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

Leon M. Fuquay,
Secretary

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Exhibit No. 1: Item 16, at Hearing on Docket No. G-115 et al.

1836 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Commissioners: Leland Olds, Chairman; Claude L. Draper, Basil Manly, John W. Scott and Clyde L. Seavey.

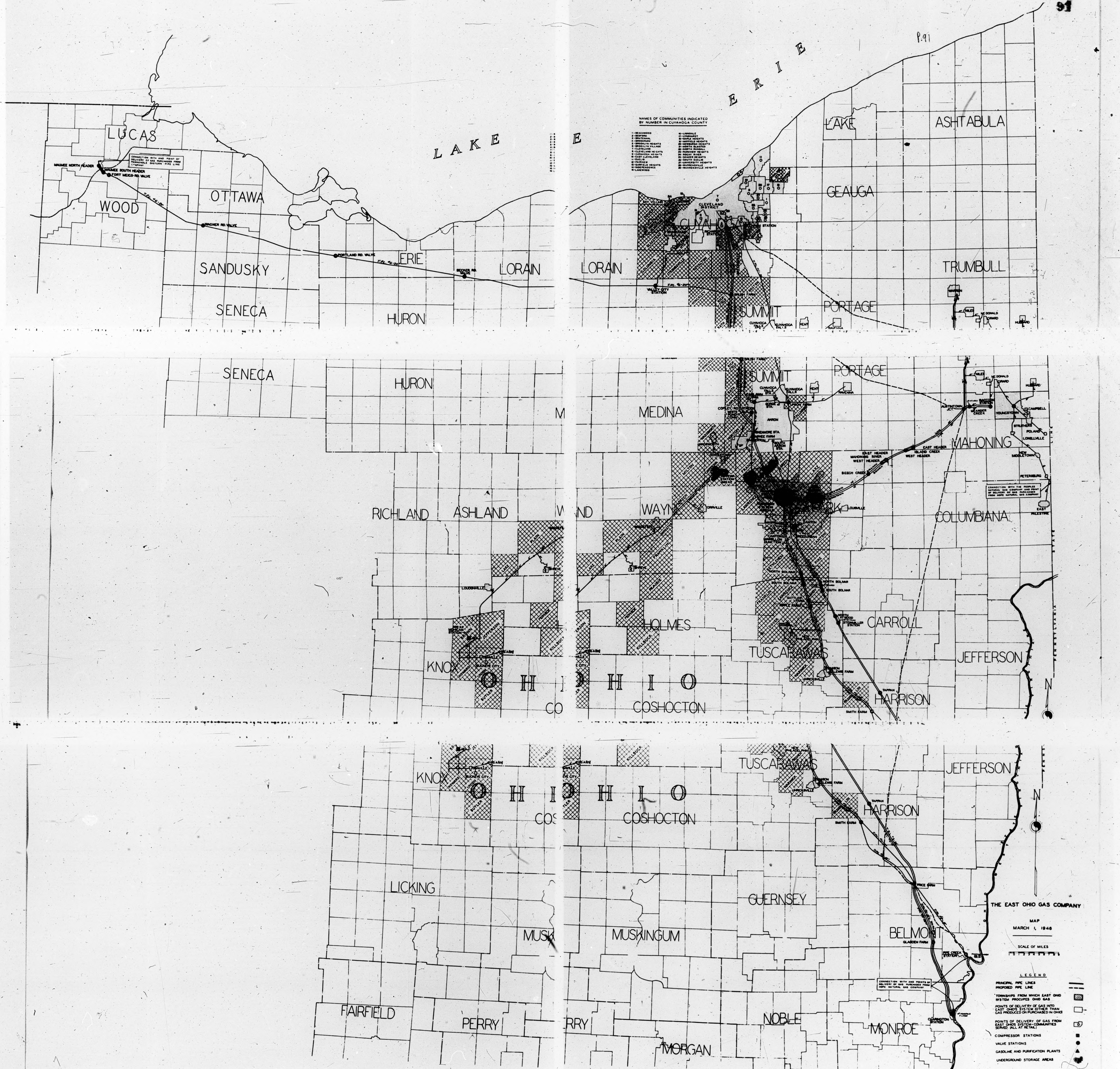
November 12, 1941.

ORDER NO. 86

Order Prescribing Form of Annual Report for Natural-Gas Companies as Defined in the Natural Gas Act (52 Stat. 821), (Classes A and B), FPC Form No. 133 (1941)

The Federal Power Commission, acting pursuant to authority granted by the Natural Gas Act, particularly Sections 10(a) and 16 thereof, and finding such action necessary and appropriate for carrying out the provisions of said Act:

(1) Hereby adopts, promulgates and prescribes for use of natural-gas companies as defined in the Natural


LAKE ERIE
LUCAS
WOOD
OTTAWA
SANDUSKY
SENECA
ERIE
HURON
LORAIN
CUYAHOGA
LAKE
ASHTABULA
GEAUGA
TRUMBULL
SUMMIT
PORTAGE
MEDINA
MAHONING
RICHLAND
ASHLAND
WAYNE
COLUMBIANA
HOLMES
CARROLL
TUSCARAWAS
KNOX
JEFFERSON
HARRISON
OHIO
COSHOCTON
LICKING
GUERNSEY
MUSKINGUM
BELMONT
FAIRFIELD
PERRY
NOBLE
MONROE
MORGAN
CLEVELAND DISTRICT
NAMES OF COMMUNITIES INDICATED BY NUMBER IN CUYAHOGA COUNTY
THE EAST OHIO GAS COMPANY
MAP
MARCH 1, 1946
SCALE OF MILES
LEGEND
PRINCIPAL PIPE LINES
PROPOSED PIPE LINE
TOWNSHIPS FROM WHICH EAST OHIO SYSTEM PROCURES OHIO GAS
POINTS OF DELIVERY OF GAS INTO EAST OHIO'S SYSTEM (OTHER THAN GAS PRODUCED OR PURCHASED IN OHIO)
POINTS OF DELIVERY OF GAS FROM EAST OHIO'S SYSTEM–COMMUNITIES SERVED (ALL AT RETAIL)
COMPRESSOR STATIONS
VALVE STATIONS
GASOLINE AND PURIFICATION PLANTS
UNDERGROUND STORAGE AREAS

than a calendar year) an original and two conformed copies, duly executed, of such Annual Report on the aforesaid FPC Form No. 2, on or before the last day of the third month following the close of the calendar year or other established fiscal year;

(3) Order No. 100, dated November 24, 1942, and FPC Form No. 133 thereby prescribed, are accordingly superseded by this order;

This order and the form herein prescribed shall become effective on January 3, 1944; and the Secretary of the Commission shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

LEON M. FUQUAY,
Secretary.

* * * * * * * * * *

Exhibit No. 3, at Hearing on Docket No. G-115 et al. (Excerpt)

1969 THE EAST OHIO GAS COMPANY

Statistics as to the Company's Properties

	As of December 31, 1945
Miles of Storage Lines	672
Miles of Field Lines	1,011
Miles of Transmission Lines	903
Miles of Distribution Lines	5,490
Number of Compressing Stations	4
Horsepower of Compressing Stations	7,705
Gasoline and Purification Plants	1
Underground Storage Areas	2
Gas Wells Owned and Operated (Net)	266
Ohio Gas Wells Owned by Others Whose Production is Purchased (Net)	446
Storage Wells—Chippewa Area	19
Storage Wells—Stark-Summit Area	296

Operated Gas Acreage	32,451
Unoperated Gas Acreage	635,739
Number of Communities Served (All at Retail)	69
Total Number of Consumers Served	
(At December 31, 1945)	551,175
Estimated Population	2,015,000

1970 THE EAST OHIO GAS COMPANY

Statistics as to Gas Handled by the Company

Natural Gas Produced and Purchased

	Year 1945 (M. c. f.)
Produced in Ohio	2,794,537
Purchased in Ohio	8,847,468
Purchased from Hope Natural Gas Company	48,506,683
Purchased from Panhandle Eastern	18,477,858
Total	78,626,546

Natural Gas Sold, Stored and Used in Own Operations

Sold to Domestic Consumers	46,674,457
Sold to Industrial Consumers	30,126,754
Field Sales	627,196
Total Sales	77,428,407
Gas Stored (Net)	802,938
Gas Used for Own Operations	275,756
Unaccounted for Gas	119,445
Total	78,626,546

* * * * * * * * * *

Question from F. P. C. Order No. 51, and Answer Filed by East Ohio Gas Co. Aug. 15, 1938 (Incorporated by reference at page 81 of the record).

2470 7 Q. Furnish a map or maps, drawn to scale, showing by states as of July 1, 1938 the miles of pipe line operated, the location of all facilities now owned or operated for the production, gathering, transportation, sale, and distribution of natural gas and indicate pipe sizes and the normal operating pressures of pipe lines, compressor stations, capacities of equipment, and other essential and appurtenant equipment. Plainly designate points at which pipe lines owned or operated by the reporting person cross state lines and points where connections are made with gas pipe lines of other individuals or companies, indicating the pipe sizes at the state lines and of all connecting pipes at the points of connection. The map should designate all points on the system where natural gas is purchased and delivered:

A. See map attached. The Company purchases gas from 428 wells and produces gas from 381 of its own wells. These 809 wells and the field and gathering lines thereto are located in Knox, Holmes, Wayne, Summit, Stark, Tuscarawas, Medina and Cuyahoga Counties, Ohio, and it is impractical to designate on this map all of the Company's wells, field and gathering lines, and each of the locations where this Ohio gas is introduced into The East Ohio Gas Company's system. This information is available on the detailed maps located in the Company's offices.

The greater part of the gas purchased by The East Ohio Gas Company from the Hope Natural Gas Company is delivered at the two locations on the Ohio River indicated on the map and is pumped from the Hope Company's Hastings Station located approximately 25 miles south of the Ohio River. Occasionally some Hope gas is delivered to the East Ohio at the Ohio-Pennsylvania state line as explained in the answer to question 8. The pressures at Hastings station vary from approximately 200 pounds to somewhat over

300 pounds, the exact amount of the pressure being dependent upon the time of the year and the East Ohio's demand for gas. No further pumping of this gas is required before it is ultimately distributed in the various city plants in Ohio. The East Ohio Gas Company owns that portion of the river crossings north of the low water mark on the Ohio side of the Ohio River. The gas
2471 purchased and produced by the Company at the various wells in Ohio is transmitted to the distribution plants at pressures dependent upon the rock pressure of the wells, size of field lines, location of pumping stations, distance of the distribution plants from the wells, demands of the distribution plants for gas, and many other factors. The pressures in these field lines may under certain circumstances reach as high as 400 pounds. At the various communities in which the Company delivers and sells gas at retail, and indicated on the map, the pressure of the gas is reduced to a few ounces suitable for domestic use.

* * * * * * * * * *

Excerpts from Application of East Ohio Gas Company—Docket No. G-458 (Incorporated by reference at page 81 of the record).

2935 At the connection with the Panhandle Eastern line gas will be received by Applicant at pressure which are expected to be sufficent to deliver in excess of a maximum of 50 million cubic feet per day. The gas will be transmitted without any further compression to the consumers' burner tips. Some gas will be taken via the Medina line to the western side of Cleveland, as shown on Exhibit C, and the balance will be delivered into Brush Farm station for introduction into the Applicant's pine line system. The maximum delivery of firm gas will be 50 million cubic feet per day in the winter, but in the summer months Applicant expects to take additional quantities of gas which, together with the firm gas, will make a maximum of 81 million cubic feet. The minimum will be not less than approximately 50 million cubic feet per day. A line pressure at Maumee of

approximately 285 # per square inch will be adequate to make the minimum delivery and a pressure of approximately 400 # per square inch the maximum delivery under the contract.

(F) The natural gas which Applicant proposes to purchase from Panhandle Eastern is produced or purchased by Panhandle Eastern in the Panhandle Field in Texas and in the Hugoton Field in Kansas. In Opinion No. 81 deciding the matters in Docket No. G-410 the Commission has found that Panhandle Eastern has gas reserves sufficient to meet its presently estimated demands for more than twenty-five years and that it has negotiations pending for additional reserves.

* * * * * * * * * *

Excerpts from Application of East Ohio Gas Company for an Additional Transmission Line—Docket No. G-695 (Incorporated by reference at page 84 of record).

3264 Applicant purchases 50,000,000 cubic feet of gas per day from the Panhandle Eastern Pipe Line Company. It receives this gas at a point just south of Maumee, Ohio, and transports it through a 20-inch pipe line 112 miles long, to its Brush Farm valve station, 11½ miles north of Akron. A 10-inch branch line extends north from this 20-inch line at Valley City, Ohio, to the south edge of Cleveland near its westerly boundary. A portion of the gas received from the Panhandle Eastern Pipe Line Company is diverted into this line and is delivered into Cleveland directly. The balance of the gas continues to the Brush Farm valve station at which point it enters the main transmission system. In addition to gas from Hope, Applicant procures gas from the Ohio producing fields located principally in Holmes, Summit, Stark, Columbiana, Tuscarawas, Medina, and Cuyahoga Counties. A portion of this gas is produced by Applicant and the remainder is purchased from independent producers.

* * * * * * * * * *

3270 (H) The operation of the proposed pipe line is to be carried on as a part of Applicant's general natural gas system, in the State of Ohio, and will be supervised by the department that now has charge of its transmission lines. No service or management contracts with respect thereto are contemplated.

* * * * * * * * * *

Excerpts from Exhibit I-2 to Application—Docket No. G-695 (Incorporated by reference at page 240 of the record)

3290 Statement No. 7 shows the quantities of gas which would be available into The East Ohio Gas Company's system through a 20-inch line with intake pressures varying from approximately 340 # to 480 #. (These pressures are at the Panhandle's 22-inch line connection, as indicated on the map on page 25.) It will be noted that when the pressure on the Panhandle's 22-inch line is 480 # it will be possible to transmit more than 81,000,000 cubic feet per day into The East Ohio Gas Company's system. In the event of a line break in either the Hope's or East Ohio's transmission system, such as occurred to the Hope Company last December, or trouble at one of the large valve stations such as Gross Farm, either of which occurrence would greatly curtail the normal deliveries to the East Ohio's customers this large supply from an independent source to a point close to the major markets provides an added protection to our normal supply.

* * * * * * * * * *

3312 Done the date above written.

THE EAST OHIO GAS COMPANY,

By (Signed) J. FRENCH ROBINSON,
President.

(Signed) P. F. LEUSCH, *Secretary.*

GAS COMPANIES INCORPORATED,

By (Signed) F. H. LERCH, JR.,
President.

(Signed) JAMES COMERFORD, *Ass't. Secretary.*

* * * * * * * * * *

3325 UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Commissioners: Claude L. Draper, Acting Chairman; Basil Manly, John W. Scott. Clyde L. Seavey, not participating. February 14, 1939.

In the Matter of: The East Ohio Gas Company.

Docket No. G-115.

Order Instituting Investigation

It appearing to the Commission that:

(a) The East Ohio Gas Company is engaged in the transportation of natural gas in interstate commerce and is, therefore, a natural-gas company within the meaning of the Natural Gas Act;

(b) On October 26, 1938, the City of Cleveland filed with the Commission a petition praying that an investigation be instituted by the Commission, pursuant to Section 5(b) of the Natural Gas Act, to determine the cost of transportation of natural gas by The East Ohio Gas Company from the Ohio River to the city gate of Cleveland, and that the Commission pursuant to Section 6(b) of the Natural Gas Act, order The East Ohio Gas Company to file with the Com-

mission instanter an inventory of its property devoted in whole or in part to the transportation of interstate natural gas and a statement of the original cost of such property.

(c) On November 17, 1938, the City of Cleveland filed with the Commission an amendment to its said petition, in which the City tenders to the Commission its fullest cooperation and any facilities which it may have available in aid of the requested investigation;

(d) In a communication to the Commission, dated November 10, 1938, an attorney for The East Ohio Gas Company submitted the company's objections to the institution of the requested investigation; in a communication to the Commission, dated November 25, 1938, attorneys for the City of Cleveland responded to the said objections of the company; in a communication to the Commission, dated December 5, 1938, said attorney for the company responded to the said communication of November 25, 1938, submitted by attorneys for the City of Cleveland:

3326 Wherefore, upon consideration of the said petition of the City of Cleveland, as amended and the communications relating thereto received from attorneys for the City of Cleveland and The East Ohio Gas Company, the Commission *finds* that:

(1) It is advisable, necessary, and proper, in the public interest, for the Commission to institute an investigation, on its own motion, into and concerning the cost of transportation of natural gas by The East Ohio Gas Company from the Ohio River to the city gate of Cleveland, Ohio, and to order the East Ohio Gas Company to file an inventory and a statement of the original cost of its property used or useful in the transportation of natural gas from the Ohio River to the city gate of Cleveland, Ohio;

THE EAST OHIO GAS COMPANY

Proposed Pipe Line from Maumee to Brush Farm, Showing Pressures and Quantities of Gas Under Various Pressure Conditions Including Removal of that Portion of Present Medina Line South of New Medina Connection and Relaying this Pipe to Increase the Capacity of the Line from New Medina Connection North to Cleveland

	Pressures (Lb. per Sq. In.) At					Quantities of Gas (M. Cu. Ft. per Day) Delivered At Cleveland and Brush Farm				
Basis No.	Panhandle 20″ Line Connection With Their New 16″ Line	Proposed East Ohio 20″ Inlet West Side Maumee River	Proposed Medina Connection	Proposed Connection At Brush Farm	Cleveland	To Cleveland via Re arranged Medina Line	To Brush Farm via New 20″ Line	Total	All Gas to Brush Farm via New 20″ Line	All Gas to Cleveland via Re-arranged Medina Line
1	484	399	161	125	35	19,500	61,900	81,400	80,000	47,700
2	471	389	158	125	35	19,300	59,900	79,200	77,700	46,400
3	458	379	156	125	35	19,000	57,800	76,800	75,500	45,200
4	445	368	154	125	35	18,700	55,700	74,400	73,300	44,000
5	432	358	153	125	35	18,500	53,700	72,200	71,000	42,700
6	419	347	151	125	35	18,200	51,600	69,800	68,600	41,400
7	406	337	149	125	35	17,900	49,600	67,500	66,300	40,200
8	393	326	148	125	35	17,700	47,500	65,200	64,000	38,900
9	380	316	146	125	35	17,400	45,500	62,900	61,700	37,700
10	367	306	144	125	35	17,100	43,500	60,600	59,400	36,400
11	354	296	143	125	35	16,900	41,300	58,200	57,000	35,200
12	342	286	141	125	35	16,700	39,400	56,100	54,900	34,000

Size and Length of Transmission Lines

3306

Line	From	To	Nominal Size	Length Miles
T.P.L. No. 1	McKee Farm	Richardson Sta	12"	28.8
T.P.L. No. 2	Pipe Creek	Richardson Sta	18"	118.5
T.P.L. No. 3	Clarington	Richardson Sta.	18"	126.9
T.P.L. No. 4	Clarington	Price Farm	20"	25.6
T.P.L. No. 4	Price Farm	Gross Farm	18"	57.8
T.P.L. No. 5	Clarington	Dunham Sta	20"	122.8
Franklin-McKee Farm Branch	Franklin Sta	McKee Farm	10"	7.2
Youngstown Branch	Gross Farm	Austintown Jct	14"	37.8
" "	Austintown Jct	Raccoon Sta	12"	4.7
Youngstown Branch	Gross Farm	Raccoon Sta	16"	42.7
Warren Branch No. 1	Austintown Jct	Warren Red Sta	10"	7.5
" " No. 2	" "	" " "	10"	7.6
Niles Branch	Warren 10	Niles Red Sta	8"	2.6
Dover-New Philadelphia Branch	T.P.L.No.2 & No.3	Dover & New Phila	6"	5.0
Imperial Branch	Penn State Line	Youngstown	8"	13.1
Ravenna Branch	Fairlawn Conn	Ravenna	8"	18.5
Kent Branch	Ravenna Br	Kent Red Sta	6"	0.7
Canton Branch	C & M Jct	Buckhill Sta	10"	2.6
Massillon Branch	C & M Jct	Massillon Sta	8"	2.1
Dunham-Willow By-Pass	Willow Sta	Dunham Sta	18"	3.4
E. Palestine Branch	Imperial Conn	E. Palestine	6"	4.5
McDonald Branch	Raccoon Sta	McDonald	8"	5.1
Akron Branch	C & M Jct	South Akron	10"	17.4
Akron Branch	White Pond	Copley Sta	8"	1.0
Mohican Main Line	Danville	End of 3"	2"	2.1
" " "	End of 2"	End of 4"	3"	6.0
" " "	End of 3"	End of 6"	4"	1.2
" " "	End of 4"	End of 10"	6"	6.6
" " "	End of 6"	End of 12"	10"	9.8
" " "	End of 10"	Barberton	12"	36.6
" " "	Barberton	Copley Station	16"	5.8
Barberton Branch	Mohican 12"	Barberton	10"	0.3
Danville-Gann Branch	Danville Reg	Gann	2"	3.7
Chippewa Branch	Mohican 12"	Chippewa Sta	18"	1.0
Loudonville Branch	Mohican 10"	Loudonville	6"	0.8
Millersburg Branch	Mohican 12"	Shreve Sta	6"	3.6
Mohican-Shreve Sta Line	Mohican 12"	Shreve Sta	10"	3.9
Orrville Branch	Mohican 12"	Orrville	6"	2.1
Shreve Branch	Millersburg 6"	Shreve	4"	0.4
Wadsworth Branch	Mohican 12"	Wadsworth	6"	1.6
Wooster Branch	Mohican 12"	Wooster	6"	0.1
Medina Line	Medina County	Cleveland	10"	26.3

Excerpts from Exhibit No. 16 to Application—Docket No. G-458: Service Contracts.

3310 AGREEMENT made and entered into January 1, 1941 by and between The East Ohio Gas Company, an Ohio corporation, of Cleveland, Ohio (hereinafter called "East Ohio") and Gas Companies Incorporated, a New York corporation, of New York (hereinafter called "Gas Companies").

WHEREAS, Gas Companies was incorporated for the purpose of and is engaged in performing services of the nature hereinafter set forth and has been rendering such services to East Ohio under an oral understanding and arrangement; and

WHEREAS, East Ohio owns one-third of all the outstanding capital stock of Gas Companies and desires to have Gas Companies continue to perform the services of the nature heretofore rendered, the same to be performed under the terms and provisions of this agreement, and at the actual cost thereof to Gas Companies.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

In consideration of the premises and the mutual covenants hereinafter contained, the parties hereto agree as follows:

First: Gas Companies will perform for East Ohio, as requested and required by East Ohio, consulting and advisory services relating to the management and administration of East Ohio's natural gas business.

Gas Companies will furnish the personnel for the rendition of such services and the officers and employees of Gas Companies will be available upon request of East Ohio to render such consultation and advice respecting all matters in connection with the production, purchase, transportation and distribution of natural gas by East Ohio.

* * * * * * * * * *

(2) Said investigation can be conducted by the Commission without prejudice to the efficient and proper conduct of its affairs;

The Commission, upon its own motion, *orders* that:

(A) An investigation be and the same is hereby instituted to determine the cost of transportation of natural gas by The East Ohio Gas Company from the Ohio River to the city gate of Cleveland, Ohio;

(B) The East Ohio Gas Company be and it is hereby directed to furnish to this Commission under oath, on or before April 17, 1939:

(a) An inventory of its lines, facilities and other classes of property devoted in whole or in part to and actually used or useful in the transportation of natural gas from the Ohio River to the city gate of Cleveland, Ohio, as of December 31, 1938;

(b) A statement by lines, facilities and other classes of property, of the cost to The East Ohio Gas Company of each item set forth in (a) above constructed by said Company as reflected on its books on December 31, 1938;

(c) A statement by lines, facilities and other classes of property, of the cost to any other person first devoting such property to the public service, estimated if not known, of such items set forth in (a) above, acquired by The East Ohio Gas Company as operating units or systems or parts thereof;

(d) A statement setting forth by years for the calendar years 1936, 1937, and 1938, and classified by accounts as kept by said Company, the operating expenses applicable to the transportation of natural gas through the lines and facilities set forth in (a) above;

3327 (e) A statement setting forth by years for the calendar years 1936, 1937, and 1938, the total quantities of natural gas transported through the lines and facilities set forth in (a) above, and segregated between natural gas purchased from Hope Natural Gas Company and natural gas received from other sources.

(f) A legible map showing the lines and facilities set forth in (a) above, and designating the receiving points of natural gas into said lines from each separate source.

By the Commission.

LEON M. FUQUAY,
Secretary.

* * * * * * * * * *

3798 Filed Feb. 25, 1943

Before the

FEDERAL POWER COMMISSION

Docket No. G-115.

In the Matter of

THE EAST OHIO GAS COMPANY.

Petition of the City of Cleveland for Leave to Intervene.

Now comes the City of Cleveland, Ohio, and for its petition for leave to intervene herein, says:

First: Petitioner, the City of Cleveland, Ohio, is a municipal corporation duly organized and existing under the Constitution and laws of the State of Ohio, and is a municipality within the meaning of the Natural Gas Act. (Sec. 2(3).)

Second: The Council of the City of Cleveland is the regulatory body of the City of Cleveland having original jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the City of Cleveland, and is a

"state commission" within the meaning of the Natural Gas Act, which defines "state commission" as "the regulatory body of the state or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the state or municipality." (Sec. 2(8).)

Third: The East Ohio Gas Company is a corporation duly organized and existing under the laws of the State of Ohio, has its principal place of business in the City of Cleveland and State of Ohio, and is a natural gas company engaged in the transportation of natural gas in interstate commerce within the meaning of the Natural Gas Act.

(1) This Honorable Commission has hitherto determined that East Ohio is a person engaged in the transportation of natural gas in interstate commerce; that said East Ohio is a "natural gas company" within the meaning of the Natural Gas Act; and that said The East Ohio Gas Company is subject to the provisions of said Act and the rules and regulations prescribed by the Commission
3799 thereunder. *In the Matter of The East Ohio Gas Company* (F. P. C. Docket G-115; Opinion No. 37; Order dated February 14, 1939 and April 14, 1939) 28 P. U. R. (N. S.) 129; petition for review dismissed, *East Ohio Gas Company* v. *Federal Power Commission,* 115 F. (2d) 385 (C. C. A. 6th).

(2) East Ohio is a wholly owned subsidiary of the Standard Oil Company (New Jersey), and is engaged in the business of purchasing, transporting and selling natural gas for ultimate consumption within the state of Ohio.

(3) East Ohio is engaged in the operation of natural gas transmission pipe lines including main trunk pipe lines commencing at the West Virginia-Ohio state line and extending to Cleveland, Ohio, and in the operation of certain lateral lines extending from the main trunk pipe lines to other cities and towns in northeastern Ohio.

(4) East Ohio purchases more than 75 per cent of the natural gas which it sells from Hope Natural Gas Company, likewise a wholly owned subsidiary of the Standard Oil

Company (New Jersey), at the West Virginia-Ohio state line; the natural gas so purchased is produced in the state of West Virginia by said Hope Natural Gas Company and its vendors, is gathered by said Hope Natural Gas Company and its vendors; and is transported by said Hope Natural Gas Company and its vendors from termini of gathering lines through hundreds of miles of transmission pipe lines in West Virginia to the point of sale to East Ohio at the West Virginia-Ohio state line.

(5) The flow of natural gas from the termini of gathering lines in West Virginia through the interconnected facilities of Hope Natural Gas Company and its vendors and through the interconnected facilities of The East Ohio Gas Company to points of local distribution in Ohio is continuous, and constitutes a regular unbroken transmission of such gas from such termini of gathering lines in West Virginia to points of ultimate public consumption in Ohio.

Fourth: The position of petitioner, in the event that leave to intervene is granted, is in support of a determination that The East Ohio Gas Company is a natural gas company within the meaning of the Natural Gas Act and in support of a determination of the cost of natural gas service rendered by said company, including the cost of transportation of natural gas by said company from the Ohio River to the city gate serving Cleveland, Euclid and Lakewood, Ohio.

3800 *Fifth:* The petitioner has a substantial interest in a determination that East Ohio is a natural gas company within the meaning of the Natural Gas Act and therefore subject to the jurisdiction of the Federal Power Commission. In the case of *East Ohio Gas Company* v. *Cleveland,* P. U. C. O. No. 10,202, The Public Utilities Commission of Ohio, employing the reproduction cost theory of rate-making, found the rate base of East Ohio's affiliate, Hope Natural Gas Company, to be approximately $73,000,000 for 1938. In the case of *Cleveland* v. *Hope Natural Gas Company,* F. P. C. Docket No. G-100, the Federal Power Commission, employing the actual money prudent investment method

of rate-making, found the rate base of said Hope Natural Gas Company to be approximately $32,000,000 for 1939. The City of Cleveland is therefore interested in the assertion of the existing jurisdiction of the Federal Power Commission over every natural gas company engaged in the service of Cleveland consumers to the end that the public interest may be fully protected.

Sixth: The petitioner has a substantial interest in a determination of the cost of natural gas service rendered by The East Ohio Gas Company, including the cost of transportation of natural gas by said company from the Ohio River to the city gate serving Cleveland, Euclid and Lakewood, Ohio. In the case of *East Ohio Gas Company* v. *Cleveland*, aforesaid, The Public Utilities Commission of Ohio, employing the reproduction cost theory of rate-making, found the cost of all natural gas delivered by East Ohio at the Cleveland city gate to be approximately 39 cents per M.c.f. The City expects the investigation by your Honorable Commission in the instant case to show that the actual cost of gas at the Cleveland city gate, upon the actual money prudent investment basis, is less than 30 cents per M.c.f. Your determination of the cost of natural gas service by The East Ohio Gas Company is an appropriate exercise of the nation's power to regulate interstate commerce by the method of publicity, and will furnish substantial aid to the City of Cleveland.

Seventh: The filing of this petition is authorized by Section 83 of the Charter of the City of Cleveland which provides:

> "Sec. 83. The director of law shall be an attorney at law admitted to practice in the state of Ohio. He shall be the legal adviser of and attorney and counsel for the city, and for all officers and departments thereof in matters relating to their official duties. He shall
> 3801 prosecute or defend all suits for and in behalf of the city and shall prepare all contracts, bonds and other instruments in writing in which the city is concerned and shall endorse on each his approval of the

form and correctness thereof. No such bond, contract or instrument shall become effective without such endorsement by the director of law thereon.'

Eighth: Your petitioner, because of its interest in this proceeding aforesaid, deems it necessary and proper that it intervene herein.

WHEREFORE, your petitioner, the City of Cleveland, prays that it may be permitted to intervene herein and assert its position as the same may be necessary and proper and as its interests and those of its Council and people may appear.

THE CITY OF CLEVELAND,

By THOMAS A. BURKE, JR.,
Director of Law,
SPENCER W. REEDER,
Assistant Director of Law in Charge of Utility Controversies,
Its Attorneys.

STATE OF OHIO,
CUYAHOGA COUNTY, ss.

FRANK J. LAUSCHE, being first duly sworn, says that he is Mayor of the City of Cleveland, Ohio, a municipal corporation, petitioner herein; that he has read the foregoing petition of the City of Cleveland to intervene and that the statements and allegations contained therein are true.

FRANK J. LAUSCHE.

Sworn to before me and subscribed in my presence this 13th day of February, 1943.

IRENE G. CASHMAN,
(Seal) *Notary Public.*

(My Commission expires March 27, 1944)

• • • • • • • • • •

3802 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Commissioners: Leland Olds, Chairman; Claude L. Draper, Basil Manly, John W. Scott and Clyde L. Seavey.

March 9, 1943

In the Matter of The East Ohio Gas Company

Docket No. G-115

Order Permitting Intervention

It appearing to the Commission that:

(a) On February 25, 1943, the City of Cleveland, Ohio, filed a petition for leave to intervene in the above-entitled proceeding;

(b) The participation of the City of Cleveland in said proceeding may be in the public interest;

The Commission *orders* that:

The City of Cleveland be and it is hereby permitted to become an intervenor in said proceeding; provided, however, that such permission shall not be construed as recognition by this Commission that said City of Cleveland might be aggrieved by any order of this Commission issued in said proceeding.

By the Commission

LEON M. FUQUAY,
Secretary

• • • • • • • • • •

3805 Filed June 25, 1942

Before the
FEDERAL POWER COMMISSION

Docket No. G-399

CITY OF EUCLID,

A Municipal Corporation,
Complainant
vs.
THE EAST OHIO GAS COMPANY
A Corporation
Defendant

Complaint.

To the Honorable Members of the Federal Power Commission:

The City of Euclid brings this its complaint against The East Ohio Gas Company and for its cause of action avers:

First: Complainant, the City of Euclid (hereinafter for convenience termed "Euclid"), is a municipal corporation duly organized and existing under the laws and constitution of the state of Ohio, and is a municipality within the meaning of the Natural Gas Act.

Second: Defendant, The East Ohio Gas Company (hereinafter for convenience designated as "East Ohio"), is a corporation duly organized and existing under the laws of the state of Ohio, has its principal place of business in the City of Cleveland in the state of Ohio, and is a natural gas company engaged in the transportation of natural
3806 gas in interstate commerce within the meaning of the Natural Gas Act.

(1) This Honorable Commission has hitherto determined that East Ohio is a person engaged in the transportation of natural gas in interstate commerce; that East Ohio is a "natural gas company" within the meaning of the Natural Gas Act; and that The East Ohio Gas Company is subject to the provisions of said Act and the rules and regulations

prescribed by the Commission thereunder. In the matter of the East Ohio Gas Company (F. P. C. Docket G-115; Opinion No. 37; Order dated February 14, 1939 and April 14, 1939) 28 P. U. R. (N. S.) 129; petition for review dismissed, East Ohio Gas Company v. Federal Power Commission, 115 F. (2d) 385 (C. C. A. 6th).

(2) East Ohio is a wholly owned subsidiary of the Standard Oil Company (New Jersey), and is engaged in the business of purchasing, transporting and selling natural gas for ultimate consumption within the state of Ohio.

(3) East Ohio is engaged in the operation of natural gas transmission pipe lines including main trunk pipe lines commencing at the West Virginia-Ohio state line and extending to Cleveland, Ohio, and in the operation of certain lateral lines extending from the main trunk lines to other cities and towns in northeastern Ohio.

(4) East Ohio purchases more than 75 per cent of the natural gas which it sells from Hope Natural Gas Company, likewise a wholly owned subsidiary of the Standard Oil Company (New Jersey), at the West Virginia-Ohio state line; the natural gas so purchased is produced
3807 in the State of West Virginia by said Hope Natural
Gas Company and its vendors, is gathered by said Hope Natural Gas Company and its vendors; and is transported by said Hope Natural Gas Company and its vendors from termini of gathering lines through hundreds of miles of transmission pipe lines in West Virginia to the point of sale to East Ohio at the West Virginia-Ohio state line.

(5) The flow of natural gas from the termini of gathering lines in West Virginia through the interconnected facilities of Hope Natural Gas Company and its vendors and through the interconnected facilities of The East Ohio Gas Company to points of local distribution in Ohio is continuous, and constitutes a regular unbroken transmission of such gas from such termini of gathering lines in West Virginia to points of ultimate public consumption in Ohio.

Third: This Honorable Commission has heretofore issued various mandatory orders addressed generally to all natural gas companies subject to the Commission's jurisdiction, including inter alia, the following:

(1) Order No. 69, adopted November 3, 1939, entitled An Order Prescribing a System of Accounts For Natural Gas Companies under the Natural Gas Act, effective January 1, 1940, providing that each natural gas company shall ascertain the original cost of its gas plant, and further providing that each natural gas company shall submit said original cost to this Honorable Commission not later than January 1, 1942.

(2) Order No. 73, adopted April 9, 1940, entitled
3808 an "Order Requiring Submission of Supplemental Data in Connection with Gas Plant Instruction 2-D of the Uniform System of Accounts Under the Natural Gas Act," said Gas Plant Instruction 2-D being the section of Order No. 69 aforesaid which requires the submission of the original cost of gas plant of each natural gas company to the Commission not later than January 1, 1942.

(3) Order No. 69-A adopted March 3, 1942, entitled an order "Prescribing Accounting with Respect to Account 100.5, Gas Plant Acquisition Adjustments," providing in connection with said original cost studies that debit amounts in Account 100.5, Gas Plant Acquisition Adjustments may be charged to Account 414, Miscellaneous Debits to Surplus, in whole or in part, or may be amortized over a reasonable period by charges to Account 537, Miscellaneous Amortization, without further order of the Commission.

Each of said orders is incorporated herein by reference to the files of the Commission.

Fourth: Said Order No. 69, together with a letter of transmittal dated November 30, 1939, was served upon East Ohio by registered mail as Registered Article No. 436,145, and was received and receipted for by said East Ohio on December 1, 1939.

Said Order No. 73 together with a letter of transmittal dated April 17, 1940, was served upon East Ohio by reg

istered mail as Registered Article No. 436,127, and was received and receipted for by said East Ohio on April 19, 1940.

Said Order No. 69-A, together with a letter of transmittal dated March 18, 1942, was served upon East
3809 Ohio by registered mail as Registered Article No. 675,520, and was received and receipted for by said East Ohio on March 23, 1942.

Fifth: Defendant East Ohio has failed and refused to comply with said regulations and orders.

Sixth: The interest of the Complainant in the enforcement of orders of the Commission requiring East Ohio to ascertain and file its original cost is substantial. There are thousands of consumers of natural gas furnished by East Ohio within the corporate limits of the petitioner; East Ohio having a monopoly on the sale of such natural gas. The consumers include a large number of industrial plants, practically all of which are now engaged entirely in production in connection with the war effort. The petitioner now has a franchise with East Ohio which can be terminated on ninety days' notice. The Commission has recently ruled that "original cost studies are an essential aid to the prosecution of the war effort in that they provide a sound-basis for the most effective control of the prices of utility services entering into practically every important essential war activity, as well as into the general cost of living." A knowledge of the original cost of the natural gas plant of East Ohio would be helpful to Euclid in contracting as to natural gas rates and in defending the reasonableness of legislatively fixed maximum natural gas rates against attack.

The Public Utilities Commission of Ohio on April 15, 1942, ordered the Classification of Accounts prescribed by
3810 the Federal Power Commission for companies subject to the provisions of the Natural Gas Act adopted for natural gas companies operating within the State of Ohio, effective as of January 1, 1942.

Seventh: The filing of this complaint has been authorized and directed by resolution of the Council of the City of Euclid adopted June 22, 1942.

Wherefore, Complainant City of Euclid prays that the Federal Power Commission order defendant The East Ohio Gas Company to show cause why it should not comply with said orders of the Commission requiring it to ascertain and submit its original cost, and further prays that after hearing, the Commission redetermine that defendant is a natural gas company within the meaning of the Natural Gas Act, and order defendant to comply with the orders of the Commission, requiring said natural gas company to ascertain and submit its original cost.

The City of Euclid.
By Paul H. Torbet,
Solicitor.

Stat of Ohio,
Cuyahoga County, ss.

Kenneth J. Sims, being first duly sworn, says that he is Mayor of the City of Euclid, Ohio, a municipal corporation, complainant herein; that he has read the foregoing complaint and that the statements and allegations contained therein are true as he verily believes.

Kenneth J. Sims.

Sworn to before me and subscribed in my presence this 14th day of June, 1942.

Michael Spund,
Notary Public.

(My Commssion expires March 28 1943.)

* * * * * * * * * *

3812 Filed June 25, 1942

Before the

FEDERAL POWER COMMISSION

Docket No. G-400.

CITY OF CLEVELAND,

A Municipal Corporation,

Complainant,

vs.

THE EAST OHIO GAS COMPANY,

A Corporation,

Defendant.

Complaint.

To the Honorable Members of the Federal Power Commission:

The City of Cleveland brings this its complaint against The East Ohio Gas Company and for its cause of action avers:

First: Complainant, the City of Cleveland (hereinafter for convenience termed "Cleveland"), is a municipal corporation duly organized and existing under the laws and constitution of the state of Ohio, and is a municipality within the meaning of the Natural Gas Act.

Second: Defendant, The East Ohio Gas Company (hereinafter for convenience designated as "East Ohio"), is a corporation duly organized and existing under the laws of the state of Ohio, has its principal place of business in the City of Cleveland in the state of Ohio, and is a natural gas company engaged in the transportation of natural gas in interstate commerce within the meaning of the Natural Gas Act.

(1) This Honorable Commission has hitherto determined that East Ohio is a person engaged in the transportation of natural gas in interstate commerce; that said East Ohio is a "natural gas company" within the meaning of the

Natural Gas Act; and that said The East Ohio Gas Company is subject to the provisions of said Act and the rules and regulations prescribed by the Commission thereunder. *In the Matter of The East Ohio Gas Company* (F. P. C. Docket G-115; Opinion No. 37; Order dated February 14, 1939 and April 14, 1939) 28 P. U. R. (N. S.) 129; petition for review dismissed, *East Ohio Gas Company* v. *Federal Power Commission*, 115 F. (2d) 385 (C. C. A. 6th).

3813

(2) East Ohio is a wholly owned subsidiary of the Standard Oil Company (New Jersey), and is engaged in the business of purchasing, transporting and selling natural gas for ultimate consumption within the state of Ohio.

(3) East Ohio is engaged in the operation of natural gas transmission pipe lines including main trunk pipe lines commencing at the West Virginia-Ohio state line and extending to Cleveland, Ohio, and in the operation of certain lateral lines extending from the main trunk pipe lines to other cities and towns in northeastern Ohio.

(4) East Ohio purchases more than 75 per cent of the natural gas which it sells from Hope Natural Gas Company, likewise a wholly owned subsidiary of the Standard Oil Company (New Jersey), at the West Virginia-Ohio state line; the natural gas so purchased is produced in the state of West Virginia by said Hope Natural Gas Company and its vendors, is gathered by said Hope Natural Gas Company and its vendors; and is transported by said Hope Natural Gas Company and its vendors from termini of gathering lines through hundreds of miles of transmission pipe lines in West Virginia to the point of sale to East Ohio at the West Virginia-Ohio state line.

(5) The flow of natural gas from the termini of gathering lines in West Virginia through the interconnected facilities of Hope Natural Gas Company and its vendors and through the interconnected facilities of The East Ohio Gas Company to points of local distribution in Ohio is continuous, and constitutes a regular unbroken transmission of such gas

from such termini of gathering lines in West Virginia to points of ultimate public consumption in Ohio.

Third: This Honorable Commission has heretofore issued various mandatory orders addressed generally to all natural gas companies subject to the Commission's jurisdiction, including *inter alià*, the following:

(1) Order No. 69, adopted November 3, 1939 entitled An Order Prescribing a System of Accounts For Natural Gas Companies under the Natural Gas Act, effective January 1, 1940, providing that each natural gas company shall ascertain the original cost of its gas plant, and further providing that each natural gas company shall submit said original cost to this Honorable Commission not later than January 1, 1942.

3814 (2) Order No. 73, adopted April 9, 1940, entitled an "Order Requiring Submission of Supplemental Data in Connection with Gas Plant Instruction 2-D of the Uniform System of Accounts Under the Natural Gas Act," said Gas Plant Instruction 2-D being the section of Order No. 69 aforesaid which requires the submission of the original cost of gas plant of each natural gas company to the Commission not later than January 1, 1942.

(3) Order No. 69-A adopted March 3, 1942, entitled an order "Prescribing Accounting with Respect to Account 100.5, Gas Plant Acquisition Adjustments," providing in connection with said original cost studies that debt amounts in Account 100.5, Gas Plant Acquisition Adjustments may be charged to Account 414, Miscellaneous Debits to Surplus, in whole or in part, or may be amortized over a reasonable period by charges to Account 537, Miscellaneous Amortization, without further order of the Commission.

Each of said orders is incorporated herein by reference to the files of the Commission.

Fourth: Said Order No. 69, together with a letter of transmittal dated November 30, 1939, was served upon East Ohio by registered mail as Registered Article No. 436,145, and was received and receipted for by said East Ohio on December 1, 1939.

Said Order No. 73, together with a letter of transmittal dated April 17, 1940, was served upon East Ohio by registered mail as Registered Article No. 436,127, and was received and receipted for by said East Ohio on April 19, 1940.

Said Order No. 69-A, together with a letter of transmittal dated March 18, 1942, was served upon East Ohio by registered mail as Registered Article No. 675,520, and was received and receipted for by said East Ohio on March 23, 1942.

Fifth: Defendant East Ohio has failed and refused to comply with said regulations and orders.

Sixth: Cleveland has a substantial interest in the enforcement of the Commission's orders requiring East Ohio to ascertain and file its original cost, in that a knowledge of said original cost would be helpful to the City in contracting as to natural gas rates, in legislatively fixing maximum natural gas rates in the first instance, in defending the reasonableness and constitutionality of such legislatively fixed maximum natural gas rates against attack by injunction suits in the courts or on administrative review, and for other purposes.

3815 Moreover, as this Commission has recently ruled *In the Matter of Minnesota Power and Light Company*, Docket No. IT 5769, decided March 12, 1942, "Reclassification and original cost studies are an essential aid to prosecution of the war effort in that they provide a sound basis for the most effective control of the prices of utility services entering into practically every important essential war activity as well as into the general cost of living. The availability of such regulation as a means of warding off the dangers of inflation in this field apparently led the Congress specifically to exempt the control of public utility prices from the provisions of the Emergency Price Control Act of 1942."

Furthermore, at a regular session of The Public Utilities Commission of Ohio held at Columbus, Ohio, on the 15th day of April, 1942, the Classification of Accounts prescribed by

the Federal Power Commission for companies subject to the provisions of the Natural Gas Act was ordered adopted by The Public Utilities Commission of Ohio for natural gas companies operating within the State of Ohio, effective as of January 1, 1942.

Seventh: The filing of this complaint is authorized by Section 83 of the Charter of the City of Cleveland which provides:

> "Sec. 83. The director of law shall be an attorney at law admitted to practice in the state of Ohio. He shall be the legal adviser of and attorney and counsel for the city, and for all officers and departments thereof in matters relating to their official duties. He shall prosecute or defend all suits for and in behalf of the city, and shall prepare all contracts, bonds and other instruments in writing in which the city is concerned and shall endorse on each his approval of the form and correctness thereof. No such bond, contract or instrument shall become effective without such endorsement by the director of law thereon."

Wherefore, Complainant City of Cleveland prays that the Federal Power Commission order defendant The East Ohio Gas Company to show cause why it should not comply with said orders of the Commission requiring it to ascertain and submit its original cost, and further prays that after hearing, the Commission redetermine that defendant is a natural gas company within the meaning of the Natural Gas Act, and order defendant to comply with said pre-
3816 viously formulated orders of the Commission, requiring said natural gas company to ascertain and submit its original cost.

The City of Cleveland,

By Thomas A. Burke, Jr.,
Director of Law,
Spencer W. Reeder,
Assistant Director of Law,
Its Attorneys.

STATE OF OHIO,
CUYAHOGA COUNTY, ss:

FRANK J. LAUSCHE, being first duly sworn, says that he is Mayor of the City of Cleveland, Ohio, a municipal corporation, complainant herein; that he has read the foregoing complaint and that the statements and allegations contained therein are true as he verily believes.

FRANK J. LAUSCHE.

Sworn to before me and subscribed in my presence this 24th day of June, 1942.

IRENE G. CASHMAN,
(Seal) *Notary Public.*

(My Commission expires March 27, 1944.)

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3818 Filed June 29, 1942

Before the

FEDERAL POWER COMMISSION

Docket No. G-401.

CITY OF LAKEWOOD

A Municipal Corporation,
Complainant,

vs.

THE EAST OHIO GAS COMPANY,
A Corporation,
Defendant.

Complaint.

To the Honorable Members of the Federal Power Commission:

The City of Lakewood brings this its complaint against The East Ohio Gas Company and for its cause of action avers:

First: Complainant, the City of Lakewood (hereinafter for convenience termed "Lakewood"), is a municipal corporation duly organized and existing under the laws and constitution of the state of Ohio, and is a municipality within the meaning of the Natural Gas Act.

Second: Defendant, The East Ohio Gas Company (hereinafter for convenience designated as "East Ohio"), is a corporation duly organized and existing under the laws of the state of Ohio, has its principal place of business in the City of Cleveland in the state of Ohio, and is a natural gas company engaged in the transportation of natural gas in interstate commerce within the meaning of the Natural Gas Act.

3819 (1) This Honorable Commission has hitherto determined that East Ohio is a person engaged in the transportation of natural gas in interstate commerce; that said East Ohio is a "natural gas company" within the meaning of the Natural Gas Act; and that said The East Ohio Gas Company is subject to the provisions of said Act and the rules and regulations prescribed by the Commission thereunder. In the matter of The East Ohio Gas Company (F. P. C. Docket G-115; Opinion No. 37; Order dated February 14, 1939 and April 14, 1939) 28 P. U. R. (N. S.) 129; petition for review dismissed, *East Ohio Gas Company v. Federal Power Commission*, 115 F. (2d) 385 (C. C. A. 6th).

(2) East Ohio is a wholly owned subsidiary of the Standard Oil Company of New Jersey and is engaged in the business of purchasing, transporting and selling natural gas for ultimate consumption within the state of Ohio.

(3) East Ohio is engaged in the operation of natural gas transmission pipe lines including main trunk pipe lines commencing at the West Virginia-Ohio state line and extending to Cleveland, Ohio, and in the operation of certain lateral lines extending from the main trunk pipe lines to other cities and towns in northeastern Ohio.

(4) East Ohio purchases more than 75 per cent of the natural gas which it sells from Hope Natural Gas Company, likewise a wholly owned subsidiary of the Standard Oil Company of New Jersey at the West Virginia-Ohio State line; the natural gas so purchased is produced in the state of West Virginia by said Hope Natural Gas Company and its vendors, is gathered by said Hope Natural Gas Company and its vendors; and is transported by said Hope Natural Gas Company and its vendors from termini of gathering lines through many miles of transmission pipe lines in West Virginia to the point of sale to East Ohio at the
3820 West Virginia-Ohio state line.

(5) The flow of natural gas from the termini of gathering lines in West Virginia through the interconnected facilities of Hope Natural Gas Company and its vendors and through the interconnected facilities of The East Ohio Gas Company to points of local distribution in Ohio is continuous, and constitutes a regular unbroken transmission of such gas from such termini of gathering lines in West Virginia to points of ultimate public consumption in Ohio.

Third: This Honorable Commission has heretofore issued various mandatory orders addressed generally to all natural gas companies subject to the Commission's jurisdiction, including *inter alia,* the following:

(1) Order No. 69, adopted November 3, 1939 entitled An Order Prescribing a System of Accounts for Natural Gas Companies under the Natural Gas Act, effective January 1, 1940, providing that each natural gas company shall ascertain the original cost of its gas plant, and further providing that each natural gas company shall submit said original cost to this Honorable Commission not later than January 1, 1942.

(2) Order No. 73, adopted April 9, 1940, entitled an "Order Requiring Submission of Supplemental Data in Connection with Gas Plant Instruction 2-D of the Uniform System of Accounts Under the Natural Gas Act," said Gas Plant Instruction 2-D being the section of Order No. 69

aforesaid which requires the submission of the original cost of gas plant of each natural gas company to the Commission not later than January 1, 1942.

(3) Order No. 69-A adopted March 3, 1942, entitled an order "Prescribing Accounting with Respect to Account 100.5, Gas Plant Acquisition Adjustments," providing in connection with said original cost studies that debit
3821 amounts in Account 100.5, Gas Plant Acquisition Adjustments may be charged to Account 414, Miscellaneous Debits to Surplus, in whole or in part, or may be amortized over a reasonable period by charges to Account 537, Miscellaneous Amortization, without further order of the Commission.

Each of said orders is incorporated herein by reference to the files of the Commission.

Fourth: Said Order No. 9, together with a letter of transmittal dated November 30, 1939, was served upon East Ohio by registered mail as Registered Article No. 436,145, and was received and receipted for by said East Ohio on December 1, 1939.

Said Order No. 73, together with a letter of transmittal dated April 17, 1940, was served upon East Ohio by registered mail as Registered Article No. 436,127, and was received and receipted for by said East Ohio on April 19, 1940.

Said Order No. 69-A, together with a letter of transmittal dated March 18, 1942, was served upon East Ohio by registered mail as Registered Article No. 675,520, and was received and receipted for by said East Ohio on March 23, 1942.

Fifth: Defendant East Ohio has failed and refused to comply with said regulations and orders.

Sixth: The interest of the Complainant in the enforcement of orders of the Commission requiring East Ohio to ascertain and file its original cost is substantial. There are thousands of consumers of natural gas furnished by East Ohio within the corporate limits of the petitioner, East Ohio having a monopoly on the sale of such natural

gas. The consumers include industrial plants now engaged in production in connection with the war effort. The
3822 petitioner now has a franchise with East Ohio. The Commission has recently ruled that "original cost studies are an essential aid to the prosecution of the war effort in that they provide a sound basis for the most effective control of the prices of utility services entering into practically every important essential war activity, as well as into the general cost of living." A knowledge of the original cost of the natural gas plant of East Ohio would be helpful to Lakewood with respect to its contract with East Ohio as to the natural gas rates. The current contract of petitioner with East Ohio contains a provision, under the conditions provided therein, for an adjustment of the Lakewood rates "to the same rate schedule as is finally fixed for domestic and commercial consumers in the City of Cleveland.

The Public Utilities Commission of Ohio on April 15, 1942, ordered the Classification of Accounts prescribed by the Federal Power Commission for companies subject to the provisions of the Natural Gas Act adopted for natural gas companies operating within the State of Ohio, effective as of January 1, 1942.

Seventh: The Charter of the City of Lakewood provides that the Mayor shall be Ex-Officio Director of Public Works and further provides that as Director of Public Works "He shall manage and control * * * all public utilities of the City supported in part or in whole by taxation and shall enforce all the obligations of privately owned or operated public utilities enforceable by the City."

Eighth: The filing of this petition has been authorized by the Mayor-Ex-Officio Director of Public Works of the City of Lakewood, Ohio.

Wherefore, Complainant City of Lakewood prays that the Federal Power Commission order defendant The East Ohio Gas Company to show cause why it should not comply with said orders of the Commission requiring it to ascertain

and submit its original cost and further prays that
3823 after hearing, the Commission redetermine that defendant is a natural gas company within the meaning of the Natural Gas Act, and order defendant to comply with the orders of the Commission, requiring said natural gas company to ascertain and submit its original cost.

THE CITY OF LAKEWOOD.
By CHARLES F. ROSS,
Director of Law.

STATE OF OHIO,
CUYAHOGA COUNTY, ss:

AMOS I. KAUFFMAN, being first duly sworn, says that he is the Mayor and Ex-Officio Director of Public Works of the City of Lakewood, Ohio, a municipal corporation, petitioner herein; that he has read the foregoing petition and that the statements and allegations contained therein are true as he verily believes.

AMOS I. KAUFFMAN.

Sworn to before me and subscribed in my presence this — day of June, 1942.

COLETTA E. BLACK,
Notary Public.

(My Commission expires Feb. 15, 1945.)

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3825 Filed July 23, 1942

Before the

FEDERAL POWER COMMISSION

Docket No. G-399.

CITY OF EUCLID

A Municipal Corporation,
Complainant,

vs.

THE EAST OHIO GAS COMPANY,
A Corporation,
Defendant.

Motion of the East Ohio Gas Company to Dismiss the Complaint.

To the Honorable Members of the Federal Power Commission:

The East Ohio Gas Company, denying now as heretofore that it is a "natural-gas company" subject to the jurisdiction of this Commission within the meaning of the Natural Gas Act, moves that the complaint of the City of Euclid herein be dismissed upon each of the following grounds:

1. The complaint asks this Commission to enforce its previously formulated orders claimed to be applicable to The East Ohio Gas Company by means of a new order, whereas the Natural Gas Act confers no authority upon the Commission to enforce its directions save by application to a Federal Court.

2. The Natural Gas Act does not authorize a municipality to complain of either alleged violations of or failures to comply with orders of this Commission pursuant to the Natural Gas Act, but only authorizes a municipality to complain "of anything done or omitted to be done by any natural-gas company in contravention of the provisions of"

the Natural Gas Act. The complaint alleges no violation of the Natural Gas Act itself.

THE EAST OHIO GAS COMPANY,

By WILLIAM B. COCKLEY,
WALTER J. MILDE,
THEODORE R. COLBORN,
1759 Union Commerce Building,
Cleveland, Ohio,
Its Attorneys.

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3828 Filed July 23, 1942

Before the

FEDERAL POWER COMMISSION

Docket No. G-400.

CITY OF CLEVELAND,
A Municipal Corporation,
Complainant,

vs.

THE EAST OHIO GAS COMPANY,
A Corporation,
Defendant.

Motion of the East Ohio Gas Company to Dismiss the Complaint.

To the Honorable Members of the Federal Power Commission:

The East Ohio Gas Company, denying now as heretofore that it is a "natural-gas company" subject to the jurisdiction of this Commission within the meaning of the Natural Gas Act, moves that the complaint of the City of Cleveland herein be dismissed upon each of the following grounds:

1. The complaint asks this Commission to enforce its previously formulated orders claimed to be applicable to

The East Ohio Gas Company by means of a new order, whereas the Natural Gas Act confers no authority upon the Commission to enforce its directions save by application to a Federal Court.

2. The Natural Gas Act does not authorize a municipality to complain of either alleged violations of or failures to comply with orders of this Commission pursuant to the Natural Gas Act, but only authorizes a municipality to complain "of anything done or omitted to be done by any natural-gas company in contravention of the provisions of" the Natural Gas Act. The complaint alleges no violation of the Natural Gas Act itself.

THE EAST OHIO GAS COMPANY,

By WILLIAM B. COCKLEY,
WALTER J. MILDE,
THEODORE R. COLBORN,
1759 Union Commerce Building,
Cleveland, Ohio,
Its Attorneys.

* * * * * * * * * *

3836 Filed July 23, 1942

Before the

FEDERAL POWER COMMISSION

Docket No. G-401.

CITY OF LAKEWOOD,

A Municipal Corporation,
Complainant,

vs.

THE EAST OHIO GAS COMPANY,
A Corporation,
Defendant.

Motion of the East Ohio Gas Company to Dismiss the Complaint.

To the Honorable Members of the Federal Power Commission:

The East Ohio Gas Company, denying now as heretofore that it is a "natural-gas company" subject to the jurisdiction of this Commission within the meaning of the Natural Gas Act moves that the complaint of the City of Lakewood herein be dismissed upon each of the following grounds:

1. The complaint asks this Commission to enforce its previously formulated orders claimed to be applicable to The East Ohio Gas Company by means of a new order, whereas the Natural Gas Act confers no authority upon the Commission to enforce its directions save by application to a Federal Court.

2. The Natural Gas Act does not authorize a municipality to complain of either alleged violations of or failures to comply with orders of this Commission pursuant to the Natural Gas Act, but only authorizes a municipality to complain "of anything done or omitted to be done by any natural-gas company in contravention of the provisions of"

the Natural Gas Act. The complaint alleges no violation of the Natural Gas Act itself.

THE EAST OHIO GAS COMPANY,
By WILLIAM B. COCKLEY,
WALTER J. MILDE,
THEODORE R. COLBORN,
1759 Union Commerce Building,
Cleveland, Ohio,
Its Attorneys.

* * * * * * * * * *

3838

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners Leland Olds, Chairman; Claude L. Draper, Richard Sachse and Harrington Wimberly.

February 16, 1946.

In the Matters of

Docket No. G 115.
THE EAST OHIO GAS COMPANY

Docket No. G-399.
CITY OF EUCLID, *Complainant*
v.
THE EAST OHIO GAS COMPANY, *Defendant*

Docket No. G-400
CITY OF CLEVELAND, *Complainant,*
v.
THE EAST OHIO GAS COMPANY, *Defendant*

Docket No. G-401.
CITY OF LAKEWOOD, *Complainant,*
v.
THE EAST OHIO GAS COMPANY, *Defendant*

Order Denying Motions to Dismiss, Consolidating Proceedings, Fixing Date of Hearing, and Requiring the East Ohio Gas Company to Show Cause

It appears to the Commission that:

(a) On October 26, 1938, *In the Matter of The East Ohio Gas Company*, Docket No. G-115, the City of Cleveland, Ohio, filed with the Commission a petition praying for an investigation and a determination by the Commission of the cost of transportation in interstate commerce of natural gas by The East Ohio Gas Company ("East Ohio") from the Ohio River to the city gate of Cleveland, and an order requiring East Ohio to file with the Commission an inventory of its property devoted in whole or in part to the transportation of interstate gas and a statement of the original cost of such property.

(b) By an order in said matter dated February 14, 1939, the Commission, pursuant to Sections 5(b) and 6(b) of the Natural Gas Act, instituted an investigation to determine the cost of transportation of natural gas by East Ohio from the Ohio River to the city gate of
3839 Cleveland, and directing East Ohio to furnish to the Commission under oath, on or before April 17, 1939, the following information and data:

(i) An inventory of its lines, facilities and other classes of property, devoted in whole or in part to and actually used or useful in the transportation of natural gas from the Ohio River to the city gate of Cleveland, Ohio, as of December 31, 1938;

(ii) A statement by lines, facilities and other classes of property, of the cost to East Ohio of each item set forth in (i) above, constructed by said Company as reflected on its books on December 31, 1938;

(iii) A statement by lines, facilities and other classes of property, of the cost to any other person first devoting such property to the public service, estimated if not known, of such items set forth

in (i) above, as were acquired by East Ohio as operating units or systems or parts thereof;

(iv) A statement setting forth by years for the calendar years 1936, 1937 and 1938, and classified by accounts as kept by said Company, the operating expenses applicable to the transportation of natural gas through the lines and facilities set forth in (i) above;

(v) A statement setting forth by years for the calendar years 1936, 1937 and 1938, the total quantities of natural gas transported through the lines and facilities set forth in (i) above, and segregated between natural gas purchased from Hope Natural Gas Company and natural gas received from other sources;

(vi) A legible map showing the lines and facilities set forth in (i) above, and designating the receiving points of natural gas into said lines from each separate source.

(c) On March 16, 1939, East Ohio petitioned for a rehearing and stay of said order of February 14, 1939. On April 14, 1939, the Commission denied the application for rehearing and stay, and amended the order of February 14, 1939, by directing East Ohio to furnish the following information in lieu of the requested information referred to in subdivision (ii) of paragraph (b) above:

3840 A statement by lines, facilities and other classes of property, as of December 31, 1938, of the cost estimated if not known, to East Ohio of each item set forth in (i) above, constructed by said Company; if the statement of cost differs from cost recorded in the books of account, a reconciliation of the amounts should be supplied;

and granted East Ohio an extension of time until

July 17, 1939, to furnish the information and data required by said order of February 14, 1939.

(d) On June 13, 1939, East Ohio filed with the United States Circuit Court of Appeals for the Sixth Circuit, a petition for review of said order of February 14, 1939; on November 8, 1940, the Court of Appeals, acting upon motion of the Commission, dismissed the petition for want of jurisdiction (*East Ohio Gas Co. v. Federal Power Commission*, 115 F. 2d 385).

(e) On November 3, 1939, by Order No. 69, the Commission pursuant to authority granted by the Natural Gas Act, prescribed a Uniform System of Accounts for Natural-Gas Companies Subject to the Provisions of the Natural Gas Act, to become effective on January 1, 1940; by Order No. 73, adopted April 9, 1940, the Commission directed natural-gas companies subject to its jurisdiction to submit certain data, statements and information, pursuant to Gas Plant Instruction 2-D of said system of accounts, on or before January 1, 1942; by Order No. 69-A, adopted March 3, 1942, the Commission prescribed certain accounting requirements respecting Account 100.5, Gas Plant Acquisition Adjustments, in said system of accounts.

(f) By Order No. 63, adopted September 6, 1939, Order No. 80, adopted January 14, 1941, Order No. 86, adopted November 12, 1941, Order No. 100, adopted November 24, 1942, and Order No. 113, adopted December 21, 1943, the Commission prescribed forms of annual financial and statistical reports for "natural-gas companies" as defined in the Natural Gas Act, designated respectively as FPC Form No. 133 (1939), FPC Form No. 133 (1940), FPC Form No. 133 (1941), FPC Form No. 133 (1942), and FPC Form No. 2 (1943 and each succeeding year); and directed that the same be filed with the Commission.

(g) By Order No. 81, adopted January 21, 1941, and Order No. 107, adopted November 23, 1943, the Commission, pursuant to authority vested in it by the Natural Gas Act, prescribed amendments to its "Provisional Rules of Practice and Regulations under the Natural Gas Act," requiring "natural-gas companies" within the meaning of said Act to furnish the Commission copies of certain contracts for the
3841 direct sale of natural gas to industrial consumers; and by Order No. 96, adopted June 23, 1942, required "natural-gas companies" to furnsh the Commission copies of certain contracts involving the sale of natural gas to any agency of the United States, or to any party whose purchase or receipt of natural gas required the approval of any agency of the United States.

(h) All of the orders referred to in paragraphs (e), (f) and (g) hereof were duly served upon East Ohio; and the time for compliance with each and all of said orders and requirements has expired.

(i) On June 25, 1942, the Cities of Cleveland and Euclid, Ohio, and on June 29, 1942, the City of Lakewood, Ohio, filed with this Commission complaints against East Ohio in the proceedings designated as *City of Cleveland, Complainant, v. The East Ohio Gas Company, Defendant,* Docket No. G-400, *City of Euclid, Complainant, v. The East Ohio Gas Company, Defendant,* Docket No. G-399, and *City of Lakewood, Complainant, v. The East Ohio Gas Company, Defendant,* Docket No. G-401. Each of said complainants alleges, *inter alia,* that East Ohio has failed and refused to comply with the aforementioned Orders Nos. 69, 73 and 69-A; that the complainant has a substantial interest in the enforcement of the Commission's orders requiring East Ohio to ascertain and file its original cost, and prays, *inter alia,*

that East Ohio be required to comply with such orders.

(j) On July 23, 1942, East Ohio filed motions to dismiss each of the aforementioned complaints together with supporting briefs; thereafter the Cities of Cleveland, Lakewood and Euclid duly filed briefs in opposition to such motions.

(k) On February 3, 1943, *In the Matter of The East Ohio Gas Company*, Docket No. G-115, the Commission issued a supplemental order for the purpose of determining whether East Ohio was a "natural-gas company" within the meaning of the Natural Gas Act; and to determine the cost of natural gas service rendered by said Company including the cost of transportation of natural gas by it from the Ohio River to the city gate serving Cleveland, Euclid and Lakewood, and setting the proceeding for hearing on March 3, 1943. On February 20, 1943, the Commission issued an order postponing such hearing to April 7, 1943. Thereafter, on February 25, 1943, the City of Cleveland filed a petition for leave to intervene in said proceeding, which petition was granted by order of March 9, 1943. On March 23, 1943, an order was issued postponing the hearing in said matter until further order of the Commission.

842 (l) On November 30, 1943, *In the Matter of The East Ohio Gas Company*, Docket No. G-458, an opinion and order were entered by the Commission in which it determined that East Ohio was a "natural-gas company" within the meaning of the Natural Gas Act. No appeal from this order was prosecuted by East Ohio, as provided for in Section 19(b) of the Natural Gas Act. On January 18, 1944, *In the Matter of The East Ohio Gas Company*, Docket No. G-266, the Commission issued an order in which it again determined that East Ohio was a "natural-gas company," and East Ohio sought no court re-

view of such order, as provided for by the Natural Gas Act.

(m) East Ohio has failed and refused to comply with each and all of the orders and requirements referred to in paragraphs (b), (c), (e), (f) and (g) hereof.

Upon consideration of the record in each of the above-entitled matters designated Docket Nos. G-115, G-399, G-400 and G-401, and the motions to dismiss and briefs on file referred to in paragraph (j) hereof, the Commission *finds* that:

Good cause exists for denying said motions to dismiss; for consolidating the aforementioned proceedings for hearing; for requiring East Ohio to show cause as hereinafter specified; and for holding a public hearing upon the matters and issues involved herein.

The Commission *orders* that:

(A) The motions of East Ohio to dismiss the respective complaints on file in the proceedings designated Docket Nos. G-399, G-400 and G-401, be and the same are hereby denied.

(B) The proceedings in Docket Nos. G-115, G-399, G-400 and G-401 be and the same are hereby consolidated for the purpose of hearing.

(C) A public hearing be held commencing on March 18, 1946, at 10:00 a. m., in the Hearing Room of the Federal Power Commission, 1800 Pennsylvania Avenue, N. W., Washington, D. C.

(i) Respecting the matters involved and the issues presented in these proceedings;

(ii) That at such hearing, East Ohio show cause, if any there be, why it is not a "natural-gas company" within the meaning of the Natural Gas Act; and why it has failed and refused to comply with the orders and requirements specified in paragraphs (b), (c), (e), (f) and (g)

hereof; and why the Commission should not
3843 institute appropriate proceedings against it, its officers and directors for failure or refusal to comply with such orders and requirements.

(D) Nothing contained in this order shall be construed as a waiver or stay of the requirements of any orders or requests of the Commission applicable to or affecting East Ohio.

(E) Interested State commissions may participate in this hearing as provided in Section 67.4 of the Provisional Rules of Practice and Regulations under the Natural Gas Act.

By the Commission.

LEON M. FUQUAY,
Secretary.

3844 UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Leland Olds, Chairman; Claude L. Draper, Richard Sachse, Nelson Lee Smith and Harrington Wimberly.

March 6, 1946.

In the Matters of

Docket No. G-115.

THE EAST OHIO GAS COMPANY

Docket No. G-399.

CITY OF EUCLID, *Complainant*
v.
THE EAST OHIO GAS COMPANY, *Defendant*

Docket No. G-400.

CITY OF CLEVELAND, *Complainent*
v.
THE EAST OHIO GAS COMPANY, *Defendant*

Docket No. G-401.

CITY OF LAKEWOOD, *Complainant*,

v.

THE EAST OHIO GAS COMPANY, *Defendant*

Docket No. G-695

THE EAST OHIO GAS COMPANY

Docket No. G-696

HOPE NATURAL GAS COMPANY.

Order Consolidating Proceedings

Upon consideration of the applications, complaints, and other documents of record in the above-entitled matters; and

It appearing to the Commission that:

(a) The above-entitled matters are each set for hearing on March 18, 1946, at 10:00 a.m., in the Hearing Room of the Federal Power Commission, 1800 Pennsylvania Avenue, N.W., Washington, D. C.

(b) Good cause exists for consolidating said matters for hearing;

(c) The hearing should be expedited and the convenience of witnesses and counsel for the respective parties served by a designation of the order in which evidence is to be received;

3845 The Commission *orders* that:

(A) The proceedings in Docket Nos. G-115, G-399, G-400, G-401, G-695 and G-696, be and the same are hereby consolidated for the purpose of hearing.

(B) The hearing will proceed on March 18, 1946, firstly, upon the matters designated Docket Nos. G-115, G-399, G-400 and G-401; secondly, upon the matter of designated Docket No. G-696; and thirdly, upon the matter designated Docket No. G-695.

(C) This order is not to be construed as limiting any of the evidence adduced at such consolidated hearing to any one of the above-docketed proceedings.

By the Commission.

LEON M. FUQUAY,
Secretary.

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3851 Filed March 18, 1946

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

Docket No. G-115

THE EAST OHIO GAS COMPANY,

CITY OF EUCLID, *Complainant,*

v.

THE EAST OHIO GAS COMPANY, *Defendant,*

Docket No. G-399

CITY OF CLEVELAND, *Complainaint,*

v.

THE EAST OHIO GAS COMPANY, *Defendant,*

Docket No. G-400

CITY OF LAKEWOOD, *Complainant,*

v.

THE EAST OHIO GAS COMPANY, *Defendant,*

Docket No. G-401

Application for Leave to Intervene

Now comes the Public Utilities Commission of the State of Ohio, which is a State Commission within the meaning of the Natural Gas Act, and pursuant to the laws and reg-

ulations in such cases made and provided, as set out in the Federal Power Commissions's order No. 124, Section 39.5, requests leave to intervene in the above-styled proceedings.

The interest of such Commission lies in the fact that for a period of thirty-five years it has exercised full regulatory jurisdiction over the property and facilities of the East Ohio Gas Company used and useful in the production, gathering, transmission, and distribution of gas within the State of Ohio, and that the jurisdiction of the State of Ohio and the Public Utilities Commission extends to and covers all matters as herein-before set out in the above-styled citations, and such matters are a direct interest to the Public Utilities Commission of Ohio and to the State of Ohio and such interest will be directly affected by these proceedings.

HUGH S. JENKINS,
Attorney General for the State of Ohio.

HARRY G. FITZGERALD, JR.,
Assistant Attorney General,
State Office Building,
Columbus, 15, Ohio,
Counsel for The Public Utilities Commission of Ohio.

• • • • • • • • • •

March 19, 1946

3853 UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Leland Olds, Chairman; Claude L. Draper, Richard Sachse, Nelson Lee Smith, and Harrington Wimberly.

• • • • • • • • • •

Order Permitting Intervention

Upon consideration of the petition filed March 18, 1946, by The Public Utilities Commission of Ohio seeking leave to intervene in the above-entitled proceedings; and

It appearing to the Commission that:

The participation of the above-named petitioner in the above-entitled proceedings may be in the public interest;

The Commission *orders* that:

The above-named petitioner be and it is hereby per mitted to become an intervenor in these proceedings.

By the Commission.

LEON M. FUQUAY,
Secretary.

• • • • • • • • • •

3854 June 25, 1946

Order Requiring Compliance With Orders Heretofore Issued.

It appears to the Commission that:

(a) On February 16, 1946, the Commission issued an order in these proceedings which, inter alia, consolidated the same for hearing upon the matters involved and the issues presented; and required The East Ohio Gas Company ("East Ohio") to show cause, if any there be, why it is not a "natural-gas company" within the meaning of the Natural Gas Act, and why it has failed and refused to comply with the orders and requirements of the Commission hereinafter specified.

(b) The consolidated proceedings came on for hearing on March 19, 1946, together with certain other proceedings pending before the Commission and consolidated with the above-entitled proceedings for the purpose of the
3855 hearing. Complainant City of Cleveland and The Public Utilities Commission of Ohio, intervener, participated in said hearing. Evidence, both oral and documentary, was introduced and briefs were thereafter filed by counsel for East Ohio, for the intervener Commission, for the State of Ohio and for this Commission.

(c) On February 14, 1939, pursuant to authority conferred by the Natural Gas Act, the Commission issued an order In the Matter of The East Ohio Gas Company, Docket No. G-115, which, as supplemented by an order in said matter dated April 14, 1939, inter alia directed East Ohio to furnish to the Commission under oath, on or before July 17, 1939, the following information and data:

(i) An inventory of its lines, facilities and other classes of property, devoted in whole or in part to and actually used or useful in the transportation of natural gas from the Ohio River to the city gate of Cleveland, Ohio, as of December 31, 1938;

(ii) A statement by lines, facilities and other classes of property, as of December 31, 1938, of the cost, estimated if not known, to East Ohio of each item set forth in (i) above, constructed by said Company; if the statement of cost differs from cost recorded in the books of account, a reconciliation of the amounts should be supplied;

(iii) A statement by lines, facilities and other classes of property, of the cost to any other person first devoting such property to the public service, estimated if not known, of such items set forth in (i) above, as were acquired by East Ohio as operating units or systems or parts thereof;

(iv) A statement setting forth by years for the calendar years 1936, 1937 and 1938, and classified by accounts as kept by said Company, the operating expenses applicable to the transportation of natural gas through the lines and facilities set forth in (i) above;

(v) A statement setting forth by years for the calendar years 1936, 1937 and 1938, the total quantities of natural gas transported through the lines and facilities set forth in (i) above, and segregated between natural gas purchased from Hope Natural Gas Company and natural gas received from other sources;

3856 (vi) A legible map showing the lines and facilities set forth in (i) above, and designating the receiving points of natural gas into said lines from each separate source.

(d) On November 3, 1939, by Order No. 69, the Commission, pursuant to authority granted by the Natural Gas Act, prescribed a Uniform System of Accounts for Natural Gas Companies Subject to the Provisions of the Natural Gas Act, to become effective on January 1, 1940; by Order No. 73, adopted April 9, 1940, the Commission directed natural-gas companies subject to its jurisdiction to submit certain data, statements and information, pursuant to Gas Plant Instruction 2-D of said system of accounts, on or before January 1, 1942; by Order No. 69-A, adopted March 3, 1942, the Commission prescribed certain accounting requirements respecting Account 100.5, Gas Plant Acquisition Adjustments, in said system of accounts.

(e) By order No. 63, adopted September 6, 1939, Order No. 80, adopted January 14, 1941, Order No. 86, adopted November 12, 1941, Order No. 100, adopted November 24, 1942, and Order No. 113, adopted December 21, 1943, the Commission prescribed forms of annual financial and statistical reports for "natural-gas companies" as defined in the Natural Gas Act, designated respectively as FPC Form No. 133 (1939), FPC Form No. 133 (1940), FPC Form No. 133 (1941), FPC Form No. 133 (1942), and FPC Form No. 2 (1943 and each succeeding year); and directed that the same be filed with the Commission.

Upon consideration of the record in these proceedings, the evidence introduced and the briefs on file, the Commission finds that:

(1) East Ohio is, and at the times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Ohio, with its principal place of business at Cleveland, Ohio; and is, and at all times since a date prior to the adoption of the Natural Gas Act on June 21, 1938, was, engaged in the business of producing, purchasing, transporting and distributing natural gas in said State, by means of an extensive pipeline system. The company sells natural gas at retail for public consumption in 69 communities in eastern Ohio, including Cleveland, Akron, Canton, Massillon and Youngstown.

(2) East Ohio owns and operates, and at all times since a date prior to June 21, 1938, owned and operated, the following facilities, among others:

3857 (i) A natural-gas 18-inch transmission pipeline, designated "T. P. L. No. 2," commencing at the Company's Pipe Creek valve station at the Ohio-West Virginia state line on the Ohio River, in Belmont County, Ohio, and extending in a general northwesterly direction to Cleveland.

(ii) A natural-gas 18-inch transmission pipeline, designated "T. P. L. No. 3," commencing at the Company's Clarington valve station at the Ohio-West Virginia state line on the Ohio River, in Monroe County, Ohio and extending in a general northwesterly direction to Cleveland.

(iii) A natural-gas 20-inch transmission pipeline, designated "T. P. L. No. 5," commencing at the Company's Clarington valve station at the Ohio-West Virginia state line on the Ohio River, in Monroe County, Ohio and extending in a general northwesterly direction to the vicinity of Cleveland.

(iv) A natural-gas transmission pipeline, designated "T. P. L. No. 4," a portion of the same being 20 inches in diameter and the remainder thereof, 18 inches, commencing at the Company's Clarington valve station at the Ohio-West Virginia state line on the Ohio River, in Monroe County, Ohio, and extending in a general northwesterly direction to Gross arm valve station, in Stark County, Ohio.

(v) A natural-gas 12-inch transmission pipeline, designated "T. P. L. No. 1," commencing at McKee Farm in Summit County, Ohio, and extending in a general northerly direction to Cleveland.

(vi) Two natural-gas transmission pipelines, each designated "Youngstown Branch line," one being 16 inches and the other, 14 inches, in diameter, commencing at Gross Farm valve station and extending in a general northeasterly direction to Austintown Junction, in Mahoning County, Ohio.

(3) T. P. L. No. 2, T. P. L. No. 3, T. P. L. No. 5 and T. P. L. No. 4 connect, and at the times mentioned herein, connected, at the Ohio-West Virginia state line with transmission pipelines of Hope Natural Gas Company
3858 ("Hope"), an affiliate of East Ohio, which extend from Hope's Hastings compressor station, located in Wetzel County, West Virginia, approximately 25 miles south of the Ohio River; and T. P. L. No. 2, T. P. L. No. 3, T. P. L. No. 5 and T. P. L. No. 4, are a direct continuation of such pipelines of Hope.

(4) East Ohio purchases, and at the times mentioned herein, purchased, from Hope, the major portion of the natural gas handled by it. Prior to the commencement in 1944 of its purchases from Panhandle Eastern Pipe Line Company ("Panhandle Eastern") referred to in paragraph (11) hereof, East Ohio procured from 70% to 85% of its supply of gas from Hope. Formerly, the natural gas which East Ohio received from Hope was produced in West Virginia; more recently, the natural gas so received by East Ohio has consisted, and now consists, of gas in part produced in West Virginia and in part purchased by Hope from the Tennessee Gas and Transmission Company, which transports the same from Texas. Most of the natural gas which East Ohio purchases from Hope is, and was, carried by Hope to the two aforementioned points on the Ohio-West Virginia state line, whence East Ohio carries, and did carry, the same in bulk to its various local distribution systems in Ohio, through T. P. L. No. 2, T. P. L. No. 3, T. P. L. No. 5, T. P. L. No. 4, T. P. L. No. 1, the Youngstown Branch lines, and other transmission facilities.

(5) The aforementioned transmission facilities of East Ohio are also used to carry natural gas produced in Ohio to points of local distribution in East Ohio's system. The first Ohio-produced gas entering T. P. L. No. 2, T. P. L. No. 3, T. P. L. No. 5 or T. P. L. No. 4, is introduced at a point approximately 40 miles from the state line.

(6) Pursuant to the obligation of contracts between Hope and East Ohio, Hope so operates, and at the times men-

tioned herein, did so operate, its Hastings compressor station and other transmission facilities in West Virginia as to cause the natural gas sold to East Ohio at the Ohio-West Virginia state line, to be there delivered at high pressures, for the purpose of propelling volumes of gas through East Ohio's transmission system to its local distribution areas. The greater portion of the natural gas so delivered by Hope is, and was, carried by East Ohio without additional compression, by means of T. P. L. No. 2, T. P. L. No. 3, T. P. L. No. 5, T. P. L. No. 4, T. P. L. No. 1, and other transmission facilities, to most of East Ohio's local distribution areas, including those in and in the vicinity of Canton, Massillon, Akron and Cleveland. The re-
3859 mainder of the natural gas so delivered by Hope is, and was, carried by East Ohio, by means of T. P. L. No. 2, T. P. L. No. 3, T. P. L. No. 5 and T. P. L. No. 4, together with the Youngstown Branch lines and other transmission facilities, to East Ohio's Youngstown-Warren-Niles area. The natural gas carried to the Youngstown-Warren-Niles area is propelled by the pressure at which it is received from Hope, plus additional pressure obtained by repumping the gas at Gross Farm. Hope's Hastings compressor station, its transmission pipelines from said station to the West Virginia-Ohio state line, and the transmission pipelines of East Ohio, are, and were, operated and controlled as a single unit or system respecting the pressures and volumes of the natural gas delivered by Hope as aforesaid.

(7) In the above-described operations, the natural gas flows, and did flow, continuously and uninterruptedly from the Wetzel compressor station in West Virginia to the points of distribution in Ohio, and such operations constitute, and did constitute, an established course of business.

(8) East Ohio also maintains, and at the times herein mentioned, did maintain, a connection of its facilities with transmission facilities of Peoples Natural Gas Company ("Peoples"), on the Ohio-Pennsylvania state line at a

point near Petersburg, Ohio, where occasionally, at times of heavy demands, comparatively small quantities of natural gas are, and were, sold and delivered to East Ohio by Hope, through the agency of Peoples. Except for the gas received by East Ohio at this connection, all of the natural gas purchased by East Ohio from Hope is, and was, received by East Ohio at the two aforementioned points on the Ohio-West Virginia state line.

(9) East Ohio owns and operates, and at all times since March 1944, owned and operated, a natural-gas 20-inch transmission pipeline, designated "T. P. L. No. 6," commencing at a point near Maumee, Ohio, and extending in a general easterly direction to its Brush Farm valve station in Summit County, Ohio; and a 10-inch branch transmission pipeline extending from such 20-inch pipeline, at Valley City, Medina County, in a northwesterly direction to Cleveland.

(10) At its westerly end, T. P. L. No. 6 connects with transmission facilities of Panhandle Eastern, which transport natural gas produced in the Amarillo and Hugoton fields in Texas, Oklahoma and Kansas. Such facilities of Panhandle Eastern include a 22-inch transmission pipeline extending in a northeasterly direction from within the State of Indiana across the northeasterly portion of Ohio,
3860 and a 16-inch transmission pipeline commencing at a point of connection with such 22-inch pipeline near the Ohio-Michigan boundary and extending to the point of commencement of T. P. L. No. 6 near Maumee, where it connects with T. P. L. No. 6. The portion of Panhandle Eastern's 22-inch pipeline that lies within Ohio is a direct continuation of the portion thereof that lies within Indiana; and Panhandle Eastern's 16-inch pipeline extending from its 22-inch pipeline to Maumee, and East Ohio's T. P. L. No. 6, constitute a direct extension from said 22-inch pipeline.

(11) East Ohio purchases, and at all times since 1944, did purchase, from Panhandle Eastern approximately

50,000 Mcf, of natural gas per day, transported by Panhandle Eastern from the aforementioned production areas in Texas, Kansas and Oklahoma to the point of connection with T. P. L. No. 6. From such point, East Ohio carries, and did carry, a portion of the natural gas in bulk, through T. P. L. No. 6 and the branch transmission pipeline commencing at Valley City, to Cleveland; and the remainder of the gas, through T. P. L. No. 6, to Brush Farm valve station. At Brush Farm valve station, the natural gas there transported enters East Ohio's main transmission system. A portion of the same is carried thence to Cleveland, Akron, Youngstown and other points of local distribution; and the remainder, to underground storage areas, for later distribution. Only natural gas received from Panhandle Eastern is, and was, carried in T. P. L. No. 6.

(12) Pursuant to contract between Panhandle Eastern and East Ohio, Panhandle Eastern maintains such high pressures in its 22-inch pipeline at the point of connection with its 16-inch pipeline as enable, and did enable, the natural gas to be delivered to East Ohio in volume, and to be carried through T. P. L. No. 6 and the Valley City branch pipeline and other transmission facilities, to the points of destination without additional compression, except that portion of the gas which is transmitted to the Youngstown-Warren-Niles area and to storage, such portion being pumped at Gross Farm.

(13) In the operations described in Findings (9) to (12), inclusive, natural gas flows, and did flow, continuously and uninterruptedly from the points of production in Texas, Oklahoma and Kansas to the points of distribution and storage areas in Ohio, and such operations constitute, and did constitute, an established course of business.

(14) During the year 1945, East Ohio handled a total of 78,626,546 Mcf. of natural gas, of which 61.7% was
3861 purchased from Hope, as hereinbefore described; 23.5% was purchased from Panhandle, as hereinbefore described; and 14.8% was gas originating in Ohio and produced or purchased by East Ohio.

(15) T. P. L. No. 2, T. P. L. No. 3, T. P. L. No. 5, T. P. L. No. 4, T. P. L. No. 1, the Youngstown Branch lines and T. P. L. No. 6 are not, and at all times mentioned herein, were not, facilities used for the production, gathering, or local distribution of natural gas. Such facilities are, and were, utilized solely for the purpose, and serve the sole function, of carrying natural gas in bulk, at high pressure and without interruption of flow, to local distribution areas, and to storage areas for later distribution.

(16) T. P. L. No. 2, T. P. L. No. 3, T. P. L. No. 5, T. P. L. No. 4, T. P. L. No. 1 and the Youngstown Branch lines now are, and were in recent times, facilities used in the transportation of large volumes of natural gas from production areas in West Virginia and Texas to local distribution areas in Ohio; and formerly, at the times prior thereto herein mentioned, were used in the transportation of large volumes of natural gas from production areas in West Virginia to local distribution areas in Ohio; such facilities now are, and were at all times herein mentioned, facilities for the transportation of natural gas in interstate commerce.

(17) T. P. L. No. 6 now is, and was at all times since March 1944, a facility used in the transportation of large volumes of natural gas from production areas in Texas, Oklahoma and Kansas to local distribution areas in Ohio; such facility now is, and was, a facility for the transportation of natural gas in interstate commerce.

(18) East Ohio now is, and was at all times herein mentioned, engaged in the transportation of natural gas in interstate commerce, and is, and was, a "natural-gas company" within the meaning of that term as used in the Natural Gas Act.

(19) On November 30, 1943, In the Matter of The East Ohio Gas Company, Docket No. G-458, an opinion and order were entered by the Commission in which it determined that East Ohio was a "natural-gas company" within the meaning of the Natural Gas Act. No appeal from this

order was prosecuted by East Ohio, as provided for in Section 19(b) of the Natural Gas Act. On January 18, 1944, In the Matter of The East Ohio Gas Company, Docket No. G-266, the Commission issued an order in which it again determined that East Ohio was a "natural-gas company," and East Ohio sought no court review of such order, as provided for by the Natural Gas Act.

(20) All of the orders referred to in paragraphs (c), (d) and (e) hereof were duly served upon East Ohio, except Orders Nos. 100 and 113; and due and timely
3862 notice of said latter two orders was given to East Ohio. The time for compliance with each and all of said orders and requirements has expired.

(21) East Ohio has partially complied with the requirements of the order dated February 14, 1939, as supplemented by the order of April 14, 1939, in that it has furnished the information and data specified in subdivisions (i), (iv), (v) and (vi) of paragraph (c) hereof; but the Company has otherwise failed and refused to comply with said order of February 14, 1939, as supplemented, in that it has failed and refused to furnish any of the information or data specified in subdivisions (ii) and (iii) of said paragraph (c).

(22) East Ohio has failed and refused to keep its books of accounts in accordance with this Commission's Uniform System of Accounts Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act, under Orders Nos. 69 and 69-A; but has kept its books of accounts in accordance with the uniform system of accounts prescribed by The Public Utilities Commission of Ohio, or permitted by The Public Utilities Commission of Ohio to be used. Since January 1, 1942, The Public Utilities Commission of Ohio has permitted the use of a uniform system of accounts the same in language as that of this Commission, and since that time East Ohio has been using such permitted system of accounts.

(23) East Ohio has failed and refused to make, or to file with the Commission by January 1, 1942 or at all, the re-

classification and original cost studies of gas plant required by Gas Plant Accounts Instruction 2-D of this Commission's Uniform System of Accounts Prescribed for Natural Gas Companies, and Order No. 73.

(24) East Ohio has failed and refused to file with the Commission the annual financial and statistical reports for "natural-gas companies", designated respectively FPC Form No. 133 (1939), FPC Form No. 133 (1940), FPC Form No. 133 (1941), FPC Form No. 133 (1942), FPC Form No. 2 (1943), and FPC Form No. 2 (1944), as required by Orders Nos. 63, 80, 86, 100 and 113.

(25) No cause or justification exists for the failure and refusal of East Ohio to comply with said orders and requirements as found in paragraphs (21), (22), (23) and (24) hereof.

The Commission orders that:

(A) East Ohio is hereby required to comply with the remaining requirements of the order of February 14, 1939, as supplemented by the order of April 14, 1939, by fur-
3863 nishing the information and data specified in subdivisions (ii) and (iii) of paragraph (c) hereof.

(B) East Ohio is hereby further required to comply with the aforesaid Orders Nos. 69, 69-A and 73; and to comply with the accounting requirements prescribed thereby, and applicable to it as a natural-gas company within the meaning of that term as used in the Natural Gas Act.

(C) East Ohio is hereby further required to comply with the requirements of the aforesaid Orders Nos. 63, 80, 86, 100 and 113.

(D) East Ohio shall, within 90 days from the date of this order, file with the Commission so much of the data, statements, information, cost studies and reports required by said order of February 14, 1939, as supplemented, by Gas Plant Accounts Instruction 2-D of the Uniform System of Accounts Prescribed for Natural Gas Companies, and by said Orders Nos. 73, 63, 80, 86, 100 and 113 as may reasonably be supplied within such period of time; and further,

within such period of 90 days, shall, respecting each and every of said orders and requirements, inform the Commission in writing as to when the Company can and will file the remainder of the required data, statements, information, cost studies and reports.

By the Commission.

LEON M. FUQUAY,
Secretary.

* * * * * * * * * *

3865 Filed Jul 24 1946

Application of the East Ohio Gas Company for a Rehearing and Stay.

The East Ohio Gas Company, hereinafter referred to as "East Ohio," defendant herein, being aggrieved by the Commission's order of June 25, 1946 in the above proceedings entitled "Order Requiring Compliance With Orders Heretofore Issued," holding East Ohio to be a "natural-gas company" within the meaning of the Natural Gas Act and directing it to comply with certain orders heretofore issued by the Commission, hereby applies for a rehearing and stay in respect of such order in accordance with Section 19(a) of the Natural Gas Act.

3866 In support of this application* East Ohio respectfully represents:

I.

(a) The Commission, as in Connecticut Light & Power Co. v. Federal Power Commission, 324 U. S. 515 (1945), page 521, erred in that its "findings and opinion make no mention of the fact and appear to have given it no weight, that the predominant characteristic of the company's overall operation is that of a local and intrastate service."

* The following abbreviations will be used herein for reference to the record: Ex.—exhibit; Stip.—stipulation; R. I.—reference by incorporation to former proceedings; Ohio G. C.—Ohio General Code; Sec.—section; East Ohio—The East Ohio Gas Company; Hope—Hope Natural Gas Company; Commission or FPC—Federal Power Commission; T.—transcript of testimony.

More specifically, the Commission erred in failing to make and give effect to each of the following numbered findings, requested by East Ohio and shown by undisputed evidence in the record, to wit:

1. Nature of East Ohio's Business. East Ohio is an Ohio corporation organized in 1910 as a merger of several other Ohio companies (R. I. Item 11, Ex. A; T. 74, 86). Its business from the beginning and now is the direct local distribution of gas in Ohio (T. 92, 108-A, 116, 133). It now serves natural gas to more than 551,000 consumers in 69 Ohio municipalities and adjacent territory, having an estimated population of more than 2,000,000 people, of which the principal are Cleveland, Akron, Canton, Massillon and Youngstown (Ex. 3, p. 1). In each of these communities East Ohio has pipe lines of various sizes and carrying various pressures to serve individual consumers at the premises where consumption occurs (See Ex. N to Application in FPC Docket No. G-695, T. 242, 246-8).

2. The total sales of East Ohio in 1945 were as follows (Ex. 3, p. 2):

	In M.c.f.
Sold to domestic consumers	46,674,457
Sold to industrial consumers	30,126,754
Field sales	627,196
Total sales	77,428,407

3. All sales to domestic and industrial consumers were made through East Ohio's local distribution systems
3867 in the 69 communities served (T. 92). No sales to industrial or other consumers from pipe lines outside of those communities were made (T. 116). No sales of any kind of out-of-state gas or a mixture of out-of-state and Ohio gas were made to any other company for resale (T. 116).

4. In each of the many incorporated communities served by East Ohio it has a local franchise for distribution (T.

117; R. I. Item 11, Ex. C, T. 74-75; Ex. 6). The rates for that service, both domestic and industrial, are fixed in each instance either by an ordinance passed by the municipal council and accepted by East Ohio, as provided in Ohio G. C. Secs. 3982 and 3983, or by order of The Public Utilities Commission of Ohio, either under a proceeding initiated by East Ohio under Ohio G. C. Secs. 614-20 et seq. or by an appeal from a municipal ordinance fixing an unacceptable rate under Ohio G. C. Secs. 614-44 et seq. Regardless of how the rate is fixed a schedule covering domestic and industrial service is filed with the Commission. All gas in 1945, except field sales, was sold to domestic and industrial consumers under the rate schedules now on file with the Ohio Commission as reproduced in Ex. 6 (T. 115-120).

5. East Ohio's only other sales are field sales in an insignificant amount (T. 120; Ex. 3, p. 2). Field sales in their entirety are made from the Ohio producing fields and the gas is entirely consumed in Ohio (T. 93).

6. Additionally, East Ohio never has and does not now transport natural gas in interstate commerce, or otherwise, for any other person, nor has it ever held itself out as being willing to undertake this service (T. 108-A). No gas is ever moved from East Ohio's pipe lines to points outside of the state (T. 97-102).

7. Regulation of East Ohio by the Ohio Commission. The Ohio Public Utilities Act defines as a public utility subject to the jurisdiction of The Public Utilities Commission of Ohio a company "engaged in the business of supplying natural gas for lighting, power or heating purposes to consumers within this state" (Ohio G. C. Secs. 614-2, -2a). "The jurisdiction, supervision, powers and duties of" the Ohio Commission are declared to extend to every public utility "the plant or property of which lies wholly within this state," to companies operating the same, and to the records and accounts of the business thereof done within this state (Ohio G. C. Sec. 614-4). The Ohio Commission

is given the power of general supervision (Ohio G. C.
3868 Sec. 614-8), to examine records (Ohio G. C. Sec. 614-7), to prescribe systems of accounts (Ohio G. C. Sec. 614-10), to compel the furnishing of adequate facilities (Ohio G. C. Sec. 614-13), to prevent rebates and discrimination (Ohio G. C. Secs. 614-14, -15), to fix and order changes in rates other than those fixed by municipal ordinance (Ohio G. C. Secs. 614-20 et seq.), to hear appeals from and set aside ordinance rates and fix substitute rates (Ohio G. C. Secs. 614-44 et seq.), to prescribe the form of annual reports (Ohio G. C. Sec. 614-48), to prescribe proper depreciation charges and require the setting up of a depreciation fund (Ohio G. C. Secs. 614-49, -50), to authorize the issuance of securities (Ohio G. C. Sec. 614-53), to approve or forbid the purchase or sale of property (Ohio G. C. Sec. 614-60), and many other usual regulatory powers.

8. Since its creation in 1911 the Ohio Commission has repeatedly exercised its regulatory powers over all the business activities and property of East Ohio. The formal regulatory proceedings before the Ohio Commission involving East Ohio are listed in Ex. 7. A summary of these proceedings is as follows (T. 128-130):

Proceedings	No.
Involving rates	160
Involving acquisition or sale of property	77
Relating to issuance of securities	11
Relating to accounting practice	4
Relating to termination or beginning of service	3
General complaints as to service, etc.	3
Total	258

9. In addition to these formal proceedings East Ohio has been required to file annual reports on forms prescribed by the Ohio Commission, conform to the Ohio Commission's uniform system of accounts, install depreciation rates fixed by the Ohio Commission, and submit to investigation and

examination of various matters by the Ohio Commission (T. 130-131). In the recent Cleveland rate case the Ohio Commission examined for depreciation and valued all of East Ohio's property, whether classified in its accounts as production, storage, transmission or distribution, except distribution property outside the Cleveland area and not involved in the Cleveland rate case (T. 131-132). In short East Ohio has no activities of any kind not under
3869 supervision and regulation by the State of Ohio and no public utility service or property not regulated in Ohio (T. 130-131).

10. East Ohio's Gas Supply. East Ohio for many years has purchased gas from Hope, delivered by Hope at the Ohio state line. The price at which all of Hope gas is sold to East Ohio was fixed in a recent rate proceeding by the FPC and is set forth in schedules filed pursuant to orders of the FPC (T. 104, R. I. Item 13, T. 75). More recently East Ohio has been purchasing part of its supply from Panhandle Eastern Pipeline Company delivered by Panhandle to East Ohio at Maumee, Ohio, where the lines of the two companies connect (Ex. 5, p. 5). This gas is likewise sold to East Ohio under a rate fixed by order of the FPC in a rate proceeding and is set forth in schedules filed pursuant to FPC orders (R. I. Item 14, T. 75-76). The balance of East Ohio's supply it procures in the Ohio fields either by production or by purchase from other Ohio producers at or near the well mouth (E. O. X. 3, p. 2).

11. All East Ohio Property used for Local Distribution. Connecting its various sources of supply with its local distribution centers East Ohio has the usual pipe lines of varying sizes and operated under various pressures, valve stations, regulator stations, compressing stations and other equipment, and an extensive underground storage area where both out-of-state and Ohio gas is stored in periods of slight demand for use in periods of large demand (Ex. 4; T. 96-102, 106-108A, 144-145, 209, 214).

12. The center of East Ohio's system for controlling supplyies to its various local distribution areas is at Gross Farm Station located just north of Canton (Ex. 4; T. 108A, 214). This Station is connected by pipe lines with all distributing areas as well as with the Ohio producing fields. Into it also run the East Ohio pipe lines carrying Hope gas from the Ohio River and those carrying the surplus of Panhandle gas not earlier diverted to Cleveland or other points (Ex. 4). At Gross Farm Station the gas can be so controlled by valves and regulators and compressing station as to flow to any part of the system where it is needed. This is true of the out-of-state gas as well as the Ohio gas (T. 108A, 214).

13. The total number of miles of pipe line owned and operated by East Ohio as of December 31, 1945 was as
3870 follows, using the accounting classification required by The Public Utilities Commission of Ohio (Ex. 3, p. 1):

	Miles
Storage lines	672
Field lines	1,011
Transmission lines	903
Distribution lines	5,490

14. All property of East Ohio of every kind and nature is located solely in the State of Ohio and it owns no pipe lines that cross the state line (T. 87-90, 132).

15. The sole business of East Ohio is the local distribution of gas and all of its property in the State of Ohio, regardless of its classification into production, transmission and distribution property, is used solely and exclusively to that end (T. 138-144). If East Ohio's distribution business were terminated it would have no use whatever for any of its property (T. 133). Its purchases and sales, receipts and deliveries are all in Ohio (T. 133).

16. There has been no substantial change in the general character of East Ohio's business and operations since the

passage of the Natural Gas Act in 1938. While an additional pipe line to take out-of-state gas was constructed to Maumee, Ohio, in 1943 (I. C. Item 15, T. 78), the only result was that East Ohio thereafter had Panhandle as well as Hope delivering out-of-state gas to it in Ohio. While all statistics relating to East Ohio have changed from year to year it has at all times since 1937 been true that its supply consists to the extent of 70% to 85% of out-of-state gas and the remainder of Ohio gas; that the price of out-of-state gas is regulated or subject to regulation by the FPC at delivery points to East Ohio; that all of East Ohio's property is in Ohio and serves no other purpose than to carry the out-of-state and Ohio gas to its own consumers' meters and appliances in Ohio; that East Ohio makes no sales for resale and does not transport or hold itself out as willing to transport gas for others; that East Ohio has no public utility obligations of any kind other than for local distribution in Ohio; and that all its rates, property and activities are fully regulated by Ohio (R. I. Items 2, 6, 11, 13, 14, 15, 16, 17, T. 73-81).

17. Cost of Compliance with Orders. East Ohio's application for rehearing in respect of the FPC orders of
3871 February 14 and April 14, 1939 in Docket No. G-115 showed that the cost of compliance therewith by East Ohio would exceed $200,000 and would not be useful in determining any local rate controversies.

18. During each of the years since the passage of the Natural Gas Act, and before, East Ohio has been keeping its boks of accounts in accordance with the uniform system of accounts prescribed by The Public Utilities Commission of Ohio or permitted by The Public Utilities Commission of Ohio to be used, and has filed annual reports, depreciation rates and similar accounting and other data with the Ohio Commission (T. 71, 130). The cost to East Ohio of attempting to comply with FPC Orders Nos. 69, 69-A and 73 requiring reclassification and a statement of original cost of all of East Ohio's properties—general, distribution, trans-

mission and production,—would now be between $1,500,000 and $2,000,000 (T. 137-138).

II.

(a) In view of the above requested findings, required by the record, which the Commission failed to make or consider, it erred in its Finding (15) that East Ohio's transmission lines Nos. 1, 2, 3, 4, 5 and 6 and its Youngstown branch lines "are not, and at all times mentioned herein, were not, facilities used for the * * * local distribution of natural gas."

(b) The Commission erred in not finding and holding that the transmission lines referred to in paragraph (a) above in their entirety are facilities used by and useful to East Ohio solely for the local distribution of natural gas in Ohio within the meaning of Section 1 (b) of the Natural Gas Act; that East Ohio is not a "natural-gas company" as defined in the Natural Gas Act, and that the Commission is without jurisdiction over East Ohio.

(c) The Commission erred in not finding and holding that the transportation by East Ohio of its own gas through the transmission lines referred to in paragraph (a) above, solely for the purpose of meeting its public utility obligations of local distribution in Ohio, is "other transportation" within the meaning of Section 1 (b) of the Natural Gas Act; that East Ohio is not a "natural-gas company" as defined in the Natural Gas Act, and that the Commission is without jurisdiction over East Ohio.

3872 III.

Even though East Ohio were properly held to be a "natural-gas company" within the meaning of the Natural Gas Act, which East Ohio denies, the Commission nevertheless erred in requiring East Ohio to comply in full with the Commission's accounting requirements as set forth in its Orders Nos. 69, 69-A and 73 for the reason that said accounting requirements apply equally to all classes of prop-

erty owned by a "natural-gas company" while the jurisdiction and authority of this Commission by the provisions of Section 1 (b) do not extend to the local distribution of natural gas, or to the facilities used for such distribution, or to the production or gathering of natural gas, or to the facilities used for such production or gathering. To the extent that said former orders of this Commission, with which East Ohio is directed to comply by virtue of said order of June 25, 1946, require East Ohio to conform to the accounting requirements of the Commission as set forth in said orders in respect of any facilities or business, other than those relating to the transportation of natural gas in interstate commerce, each of said orders is beyond the power of this Commission and invalid. Each of said orders should therefore be modified so as to apply only to such transportation property and operations.

IV.

The Commission's order of June 25, 1946 requires East Ohio to comply with a certain former Commission order in Docket No. G-115 dated February 14, 1939, as modified by an order dated April 14, 1939. The Commission will recall that these 1939 orders were both occasioned by an application instituted by the City of Cleveland in 1938 in which it was represented to this Commission that it would be helpful to the City of Cleveland in certain rate negotiations and litigation in which it was then engaged with East Ohio to determine on an original cost basis the cost to East Ohio of transporting natural gas from the Ohio River to the Cleveland city gate. Accordingly the Commission's orders required East Ohio to prepare and file a statement of the original cost of all facilities then used in transporting gas from the Ohio River to Cleveland city gate and the cost of all operating expenses attributable to that operation, all as of December 31, 1938.

By action of The Public Utilities Commission of Ohio in East Ohio Gas Company v. City of Cleveland, 27

3872 P. U. R. (N.S.) 387 (1939) and affirmance thereof by the Supreme Court of Ohio in The East Ohio Gas Co. v. Public Utilities Commission of Ohio, City of Cleveland v. Public Utilities Commission (Two Cases), 137 O. S. 225, 35 P. U. R. (N. S.) 158 (1940) the 1937-1939 rate litigation between East Ohio and the City of Cleveland pending at the time of the FPC orders referred to above was finally disposed of. By further action of The Public Utilities Commission of Ohio in The East Ohio Gas Company v. City of Cleveland, 56 P. U. R. (N. S.) 73 (1944) the rate litigation between East Ohio and the City of Cleveland pending subsequent to 1939 was finally disposed of for the period from 1939 through 1946, from which action neither East Ohio nor the City prosecuted any error or appeal. The rate fixed by the Ohio Commission in the latter proceedings has continued and is now the rate paid in Cleveland and there are now no rate controveries in any city served by East Ohio (Ex. 6, p. 22, T. 153).

Since, therefore, the controversy which occasioned these orders, directed only to East Ohio and not to all "natural-gas companies," has been completely disposed of; since those orders request data as of December 31, 1938, which is now a wholly meaningless date for any practical purpose, and since the expense to East Ohio of complying with these orders, if it be held to be a "natural-gas company," would exceed \$200,000, we earnestly suggest that the Commission reconsider and now modify its order of June 25, 1946 so as expressly to declare that East Ohio need not comply with the Commission's former order of February 14, 1939, as modified by its order of April 14, 1939. If a further rate controversy should develop between East Ohio and any of the cities served by it and if the Commission should hereafter be of the opinion on application by any such city that it could usefully require similar or other information from East Ohio, the Commission could then make an appropriate and up-to-date order. The present order is, we suggest, in a legal sense arbitrary and unreasonable in that

it requires East Ohio to spend more than $200,000 to comply with former 1939 orders useful only, if at all, in determining a question that is long since moot.

V.

(a) The investigation instituted in Docket No. G-115 and the information required by the orders in the above proceedings and the other orders involved are solely for the purpose of compiling information having no possible relevancy to any governmental object except the
3874 regulation of East Ohio's rates for the local distribution of gas in Ohio. The orders and any provisions of the Natural Gas Act construed to authorize their issuance therefore constitute an invasion of the powers reserved to the State of Ohio under the Tenth Amendment to the Constitution of the United States and an invalid extension of the powers delegated to the federal government by Article I, Section VIII thereof and are unconstitutional and void.

(b) The investigation instituted and the information required by the above-mentioned orders would result in a compilation of data which can be of no useful purpose even in the regulation of East Ohio's rates for the local distribution of gas in Ohio in view of the Ohio law relating to the matter of regulation of rates. To furnish the same would require an expense to East Ohio of up to $2,000,000. Under these circumstances insistence by the Commission upon the furnishing of this information, even if the Commission otherwise has statutory and constitutional jurisdiction, is an abuse of its statutory powers and is arbitrary and invalid as an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States and as a deprivation of East Ohio's property without due process of law and a taking of its property for public use without just compensation in violation of the Fifth Amendment thereto.

Wherefore, East Ohio, respectfully representing that grave errors have been committed in the orders heretofore made in these proceedings and in the order of June 25, 1946, requests a rehearing, reconsideration and vacation or modification of the Commission's order of June 25, 1946 and the orders therein referred to and further requests that the Commission issue a stay of said order of June 25, 1946 so that the East Ohio will not be in doubt as to its status under the Natural Gas Act and the Commission's rules and regulations and orders thereunder pending final determination of this matter.

Respectfully submitted,

The East Ohio Gas Company,
By Jones, Day, Cockley & Reavis, by
William B. Cockley and
Walter J. Milde,
1759 Union Commerce Building,
Cleveland 14, Ohio,
William A. Dougherty and
C. W. Cooper,
30 Rockefeller Plaza,
New York, N. Y.

July 22, 1946.

3875 State of Ohio,
Cuyahoga County, ss.

William B. Cockley, being first duly sworn, deposes and says that he is an attorney for The East Ohio Gas Company, a corporation and the appellant herein, that he is duly authorizd in the premises, that he has read the foregoing application for rehearing and stay and knows the contents thereof; and that the same are true as he verily believes.

William B. Cockley.

Sworn to before me and subscribed in my presence this 22nd day of July, 1946.

FREDERICK WOODBRIDGE,
Notary Public.

My commission expires Mar. 22, 1949.

* * * * * * * * * *

3877 Filed Jul 24 1946

Application of the State of Ohio and the Public Utilities Commission of Ohio for a Rehearing.

The State of Ohio * and The Public Utilities Commission of Ohio, intervenors herein, hereby apply, in accordance with Section (19)a of the Natural Gas Act, for a rehearing in respect to order issued by said Commission on June 25, 1946, in the above proceeding, wherein The East Ohio Gas Company, defendant herein, was declared to be a "natural-gas company" within the meaning of the Natural Gas Act and as a result of such finding East Ohio was
3878 directed to comply and to conform to certain orders heretofore issued by said Commission. Ohio has been aggrieved by said orders, hreinabove referred to, in that the assumption of jurisdiction by this Commission represents an unwarranted and illegal invasion of the powers of Ohio to regulate its local natural gas distributing company, which powers were clearly preserved to Ohio under the provisions of the Natural Gas Act and by the intent of Congress.

In connection with and in support of this application, Ohio respectfully submits:

I

The Commission was in error in failing to make findings and give consideration to the following undisputed facts as set forth in the record, to-wit:

* The following abbreviations will be used herein: "Ohio"—The State of Ohio; "P. U. C. O."—The Public Utilities Commission of Ohio; "FPC" or "Commission"—The Federal Power Commission; "Ohio G. C."—Ohio General Code; "East Ohio"—The East Ohio Gas Company.

1. The prior and existing jurisdiction of Ohio over local natural gas distributing companies, covering authority to regulate all phases of such utility operations. The Ohio Public Utilities Act defines as a public utility, subject to its jurisdiction, a company "engaged in the business of supplying natural gas for lighting, power or heating purposes to consumers in this state," (Ohio G. C., Sections 614-2 and 614-2a).

Other Ohio statutes covering utility regulations are as follows:

(1) Ohio G. C., Section 614-4, declares that P. U. C. O. has jurisdiction and powers and duties to regulate every public utility, "the plant or property of which lies wholly within this state", to regulate companies operating
3879 said property and the records and accounts of the business thereof done within this state, and

(2) P. U. C. O. is given the power of general supervision, (Ohio G. C., Section 614-8),

(a) to examine records (Ohio G. C., Section 614-7),

(b) to prescribe systems of accounts (Ohio G. C., Section 614-10),

(c) to compel the furnishing of adequate facilities (Ohio G. C., Section 614-13),

(d) to prevent rebates and discriminations (Ohio G. C., Sections 614-14 and 614-15),

(e) to fix and order changes in rates other than those fixed by municipal ordinance (Ohio G. C., Section 614-20 et seq.),

(f) to hear appeal from and set aside ordinance rates, and fix substitute rates (Ohio G. C., Section 614-44 et seq.),

(g) to prescribe form of annual reports (Ohio G. C., Section 614-48),

(h) to prescribe proper depreciation changes and require the setting up of a depreciation fund (Ohio G. C., Section 614-49),

(i) to authorize the issuance of securities (Ohio G. C., Section 614-53),

(j) to regulate the purchase or sale of property (Ohio G. C., Section 614-60),

(k) and many other regulatory powers.

2. East Ohio has been under the jurisdiction of
3880 P. U. C. O. for approximately 35 years and said regulatory jurisdiction has extended to and included all phases of public utility regulation.

3. Ohio has continuously regulated said East Ohio during said period.

4. The matters presently the subject of the Commission's recent orders in this cause have within the past 12 years been the subject of three complete investigations, each of which included a detailed valuation of the entire production, transmission and distribution properties of East Ohio.

5. East Ohio is a local natural gas distributing company serving 69 local incorporated communities in Ohio; said company makes no sales of gas for resale; all gas is sold under local franchises for local distribution, except field gas; all gas sold is entirely consumed in Ohio.

6. East Ohio does not transport natural gas in interstate commerce, in intrastate commerce or otherwise for any other person or company and has no gas moving in East Ohio's facilities to any point outside Ohio.

7. Rates for all services, domestic and industrial, are fixed either by ordinance passed by a municipal council and accepted by East Ohio, as provided by Ohio G. C., Sections 3982 and 3983, or by P. U. C. O. in an initial proceeding by the utility under Ohio G. C., Section 614-20 et seq., or by appeal from a municipal ordinance under Ohio G. C., Section 614-44 et seq.; and in all cases, regard-
3881 less of how the rate is fixed or determined, a schedule setting forth said rates and charges, both domestic and industrial, is filed with P. U. C. O.

8. All the property of East Ohio used in the production, storage, transmission or distribution is located within the territorial boundaries of Ohio, and such facilities are used solely for local distribution purposes.

9. P. U. C. O. has designated and regulates the system of all accounts of East Ohio, including such accounts, as production, storage, transmission or distribution; no public utility is actively conducted by East Ohio except under the supervision and jurisdiction of Ohio, and it furnishes no public utility service nor operates public utility property except under supervision and jurisdiction of Ohio.

10. The information and data requested by FPC in its order to East Ohio would result in the duplication of information already many times required to be furnished and presently on file with P. U. C. O.

11. If East Ohio is forced to comply with FPC's orders of February 14, 1939, and April 14, 1939, it will necessitate the expenditure of approximately $200,000; the expenditure of such sum for such demanded information would serve no useful purpose; there is no present need for such information; there is no present rate litigation in Ohio, wherein such information could be put to use.

12. The cost, estimated to be approximately $1,500,000, to East Ohio (and to Ohio gas consumers) to be ex-
3882 pended in the company's compliance with the Commission's orders Nos. 69, 69-A and 73, requiring reclassification and statement of original cost of all of East Ohio's properties, including general, distribution, production and transmission, is not justified in this record nor is there evidence that said expenditure will result in any useful purpose to the gas consumers in Ohio.

II

1. In addition to errors of FPC herein in failing to make findings and give consideration to the above (1 to 12) facts, said Commission erred in not finding and holding that the transmission lines, Nos. 1, 2, 3, 4, 5, and 6, and Youngstown branch of East Ohio, are facilities used and useful solely for local distribution of natural gas within the meaning and intent of Section 1(b) of the Natural Gas Act and that the Commission is without jurisdiction over East Ohio.

2. The Commission erred in finding that said transmission lines, above referred to, "are not, and at all times mentioned herein, were not, facilities used for the * * * local distribution of natural gas".

3. The Commission erred in not finding and holding that movement of natural gas owned by East Ohio in the above-mentioned lines, solely to meet local regulated distribution obligations in Ohio, is "other transportation" within the meaning and intent of Section 1(b) of the Natural Gas Act and that the Commission is without jurisdiction over East Ohio.

3883 4. The Commission erred in ordering East Ohio to comply with all of the Commission's accounting system as set out in its orders Nos. 69, 69-A and 73, for the reasons that said accounting system applies to all classes of property owned and operated by East Ohio and since said Commission's jurisdiction does not (under Section 1(b) of the Natural Gas Act) extend to local distribution, or to facilities for such local distribution, or to production or gathering, or to the facilities used for such production or gathering, East Ohio is being compelled to set up two separate expensive accounting systems to regulate identical property, the first system of accounts as required and ordered by P. U. C. O. under Ohio law, and the second system of accounts as ordered by the Commission, contrary to the Natural Gas Act and the intent of Congress.

5. The Commission erred in its attempt to assume authority over East Ohio as a natural gas company and over its accounting system on the jurisdictional test that out-of-state gas is carried in its transmission lines or that the pressure of said out-of-state gas is controlled by contract. The Commission erred in not using the test of whether said transmission properties are local distribution facilities.

6. The Commission erred in not giving consideration to the historical intent of Congress in enacting the Natural Gas Act, which declares that FPC shall not have jurisdiction over facilities used in local distribution of natural gas,

and that the Commission's authority "extends only
3884 to those matters which were not subject to regulation by the states".

7. The Commission erred in exceeding its jurisdiction in attempting to impose dual regulation upon a local natural gas company presently under Ohio's jurisdiction.

8. The Commission erred in exceeding its jurisdiction in attempting to extract information from a local natural gas distributing company where the avowed purpose of such information is to aid in the setting of a local burner rate contrary to the purpose and intent of the Natural Gas Act.

9. The Commission erred in its assumption that the facts and its findings in this cause bring East Ohio within the purview of the Natural Gas Act and, therefore, subject to its jurisdiction for accounting purposes or otherwise.

10. The Commission erred in failing to find that Ohio has been excluded by the Natural Gas Act of control and jurisdiction over the property and accounting systems, herein the subject of this cause; in failing to find and describe accurately the bounds of jurisdiction of the FPC; and in failing to find that the jurisdiction of Ohio had been properly considered and that the intent of the Natural Gas Act was to grant deliberate overlapping of authority.

III

1. The orders of the Commission in this cause and the provisions of the Natural Gas Act construed to be the basis for such orders, constitute an unwarranted and
3885 illegal invasion of the powers reserved to Ohio under the Tenth Amendment to the Constitution of the United States and an unwarranted and invalid extension of the powers delegated to the federal government by Article I, Section 8, thereof, and are unconstitutional and void.

2. The orders of FPC in this cause required the expenditure of funds upward to $2,000,000 for which the record herein shows no useful purpose nor evidence that would substantiate any assumption of a useful purpose other than

a veiled attempt to participate in the setting of a local distribution rate for natural gas not subject to federal regulation. The assumption of jurisdiction by the Commission for such purposes is unwarranted, arbitrary, invalid and in violation of the Fourth Amendment to the Constitution of the United States as an unreasonable search and seizure and as a means of depriving a local natural gas distribution company of property under the control of Ohio without due process of law, and a taking of its property for public use without just compensation in violation of the Fifth Amendment of the Constitution of the United States.

Wherefore, the State of Ohio and The Public Utilities Commission of Ohio respectfully submit that serious errors have been committed in the order made herein, request a rehearing for the purpose of reconsidering and
3886 vacating the Commission order of June 25, 1946, and the orders therein included and referred to.

Respectfully submitted,

Hugh S. Jenkins,
Attorney General of Ohio,
State House, Columbus 15, Ohio,

Harry G. Fitzgerald, Jr.,
Assistant Attorney General,
State Office Bldg., Columbus 15, Ohio,
Attorneys for the State of Ohio and The Public Utilities Commission of Ohio.

July 22, 1946.

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3887 August 23, 1946

Order Granting Rehearing and Stay

Upon consideration of the application of The East Ohio Gas Company, as filed on July 24, 1946, for a rehearing and stay of the Commission's order of June 25, 1946, and the orders to which reference is made therein, and the joint

application of the State of Ohio and the Public Utilities Commission of Ohio, as filed on July 24, 1946, for a rehearing with respect to said order of June 25, 1946, and the orders to which reference is made therein;

The Commission finds that:

Good cause exists for granting such rehearing and for granting a stay as hereinafter provided.

The Commission orders that:

(A) The above-mentioned applications for rehearing on said order of June 25, 1946, be and the same are hereby granted, such rehearing to be held commencing at
3888 10:00 a. m. (E. S. T.) on October 23, 1946, in the Hearing Room of the Commission, 1800 Pennsylvania Avenue, N. W., Washington, D. C.

(B) Said rehearing shall be limited to oral argument before the Commission by the parties of record who have heretofore appeared in the proceeding.

(C) Said order of June 25, 1946, be and the same is hereby stayed, pending determination of this matter upon rehearing.

By the Commission.

LEON M. FUQUA,
Secretary.

* * * * * * * * * *

3904 **Opinion No. 158 on Rehearing, and Order Entered Nov. 6, 1947.**

By our order of June 25, 1946, in the above-entitled consolidated matters, The East Ohio Gas Company (East Ohio) was again found to be a "natural-gas company"[1] within the meaning of the Natural Gas Act[2] and was required to comply with certain orders theretofore issued.

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[1] This Commission twice previously had found East Ohio to be a "natural-gas company": *Re The East Ohio Gas Company,* Docket No. G-458, 4 F. P. C. 15 (1943); and *Re The East Ohio Gas Company,* Docket No. G-266, 4 F. P. C. 497 (1944). Again, on July 3, 1946, we made a like finding, *Re The East Ohio Gas Company,* Docket No. G-695. East Ohio did not seek judicial review of any of these orders, as provided for by Section 19(b) of the Natural Gas Act.

[2] 52 Stat. 833; 15 U. S. C. 717-717w.

Thereafter, East Ohio and interveners, the State of Ohio and the Public Utilities Commission of Ohio, applied for rehearing and stay. Although the applications reiterated, in the main, arguments urged previously and considered by the Commission, we granted a rehearing, and stayed the order, because of the seriousness with which it had been contended that East Ohio is not a "natural-gas company" —(1) since it makes no sales of out-of-state gas for resale, (2) since it transports its own natural gas "solely for the purposes of meeting its public utility obligation of local distribution" in Ohio, and (3) since its transmission lines are, it is argued, "facilities used for" local distribution.

3905 FACILITIES AND OPERATIONS

The salient facts are without dispute, and the operations described below constitute an established course of business.

East Ohio owns and oper.. .s not less than 650 miles of high-pressure, large-diameter, natural-gas transmission pipelines connecting with like lines of Hope Natural Gas Company (Hope), at the Ohio West Virginia state line, and with a like line of Panhandle Eastern Pipe Line Company (Panhandle), at a point in the n..rthwestern part of Ohio. These lines, extending from the points of connection with Hope and Panhandle, are a part of East Ohio's transmission system connecting its sources of supply with its local distribution areas.

Natural gas produced in Texas, Oklahoma, Kansas, and West Virginia is purchased by East Ohio from Hope and Panhandle. The pressure at which such out-of-state gas is received by East Ohio (from Hope at about 290 p.s.i.; from Panhandle at about 320 p.s.i) is sufficient to propel it from points of connection to the local distribution areas in a continuous and uninterrupted flow, for the most part without additional compression. And, since movement prior to receipt by East Ohio is continuous and uninterrupted, the

gas flows continuously and uninterruptedly from points of production in Texas, Oklahoma, Kansas, and West Virginia to points of distribution in Ohio.

By means of its transmission pipelines, East Ohio thus transports in bulk the natural gas received from Hope and Panhandle to East Ohio's town-border regulating and metering stations from which extend its distribution
3906 lines whereby East Ohio sells natural gas at retail for public consumption in 69 Ohio municipalities and adjacent areas, including Cleveland, Akron, Canton, Massilon, and Youngstown.

During 1945, East Ohio transported 76,626,546 Mcf of natural gas through its facilities. Of this total, 85.2% was out-of-state gas purchased by East Ohio, 61.7% from Hope and 23.5% from Panhandle. The remaining 14.8% was produced in Ohio. The first point at which such locally-produced gas enters the transmission lines of East Ohio is approximately 40 miles from the Ohio-West Virginia state line. No locally-produced gas is transported in the 112-mile line which connects with Panhandle.

At the end of 1945, approximately 27.7% of East Ohio's total gas utility property was classified in its accounts as "transmission" property, having a corresponding value of $23,563,526.04. So classified were 903 miles of transmission lines, including the 650 miles, described above. The remaining 72.3% of its property was classified, accounting-wise, to uses other than transportation. East Ohio makes no sales in interstate commerce of natural gas for resale.

Jurisdiction

The foregoing facts pointedly show that East Ohio is "engaged in the transportation of natural gas in interstate commerce," and that it is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act.[3]

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[3] Section 1(b) provides:

"The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial,

3907 We are again impelled to this conclusion after careful consideration of the jurisdictional contentions here advanced. In large part, the substance of these contentions was treated in the Commission's opinion in Re The East Ohio Gas Company, Docket No. G-458, 4 F. P. C. 15. The reasoning there expressed in the treatment of "Jurisdiction," and directly relevant here, specifically at pages 19, 20, and through the last full paragraph on page 21, we affirm and here adopt. Likewise, we affirm and adopt the discussion of jurisdiction under the Natural Gas Act, found in Re The East Ohio Gas Company, Docket No. G-115, 1 F. P. C. 586, at pages 591 and through the second full paragraph on page 592. Thus, there is no need to treat further the contentions: (1) that a company transporting natural gas in interstate commerce cannot be a "natural-gas company" unless it also makes sales
3908 in interstate commerce for resale,[4] (2) that Congress intended, by the Natural Gas Act, only to regulate rates, and (3) that, within the meaning of Section 1(a) of the Act, a company cannot be said to engage in the "business" of transportation when it transports neither for sale for resale nor for others for hire, and hence it cannot be regulated under the Act. We turn, then, to some of the other arguments made.

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industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Section 2(6) provides:

"'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

[4] In addition to instances cited in footnote (1), *supra*, for examples of findings that a company is, or will be, a "natural-gas company" solely by reason of transportation in interstate commerce, see: *Re Southern California Gas Company and Southern Counties Gas Company of California*, Opinion No. 134, May 31, 1946, *Re the River Gas Company*, 4 F. P. C. 1098; *Central Illinois Public Service Company v. Panhandle Eastern Pipe Line Company et al.*, 4 F. P. C. 1043 (order aff'd, *Kentucky Natural Gas Corp. v. Federal Power Commission*, 159 F. 2d. 215); *Re Republic Light, Heat and Power Company, Inc.*, 4 F. P. C. 884; *Re Producers Gas Company*, 4 F. P. C. 418; and, to the same effect, *Re Empire Gas and Fuel Company, Limited*, 3 F. P. C. 1099.

Section 1(b) of the Act requires that, "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, * * * and to natural-gas companies engaged in such transportation * * *, but shall not apply to any other transportation * * *." In the face of this language, a claim to exemption is made on the ground that the interstate movement by East Ohio of its own gas, in its own lines, for its own purposes of local distribution, is "in no proper sense a transportation business of any kind," and is thus "other transportation," within the meaning of 1(b). "Other transportation" is said to mean "transportation in interstate commerce but of a character not exclusively subject to federal regulation." The
3909 short but complete answer is that 1(b) plainly does not so provide and that "other transportation" can mean only some transportation other than "transportation of natural gas in interstate commerce."

It is also contended that East Ohio's transmission pipelines, used in transporting natural gas in bulk to its centers of local distribution, are "facilities used for" local distribution. And, it is argued, exemption follows because Section 1(b) requires that "The provisions of this act * * * shall not apply * * * to the local distribution of natural gas or to the facilities used for such distribution * * *." "End use" is said to control the classification of a facility. Such a test apparently would requires that facilities be classified according to the principal ultimate purpose they serve. And it would seem that such a construction of Section 1(b) would exempt virtually all facilities used in the natural-gas industry. For the principal ultimate purpose, the "end use," of nearly all facilities is either to bring gas to centers of local distribution, or thereafter to distribute gas locally.

But this unique contention must be, and is, rejected. Classification depends upon the function for which a facility is used. For it is clear throughout the Act that Congress contemplated a division of the industry according to

functions, namely, those of production, gathering, transportation, and local distribution.[5] It is, then, illogi-
3910 cal to contend that here the 650 miles of transmission lines, which serve solely the function of transportation, are "facilities used for" local distribution. Moreover, if such facilities, serving solely the function of transportation, were so exempt under Section 1(b), important regulatory provisions of the Act, notably all of Section 7[6] regulating construction and extension of facilities and abandonment of service by natural-gas companies, would become meaningless in large part, if not entirely. And this, of course, Congress did not intend.

In view of the foregoing considerations, we explicitly find that East Ohio's 650 miles of transmission pipelines, described herein, are not "facilities used for" local distribution, and that East Ohio's transportation of out-of-state natural gas in such lines is neither "other transportation" nor "local distribution" within the meaning of Section 1(b).

In this connection, the legislative history of the Natural Gas Act reveals an unsuccessful attempt to have included in a predecessor bill (H. R. 5423, 74th Cong., 1st Sess.) amendments which would exempt companies of the type represented by the very company here involved, East Ohio. For example, one of these proposed amendments, that to Section 301(c) of H. R. 5423, read:

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[5] Recognition of like divisions, and that local distribution, as distinguished from transportation, does not commence until after town-border regulating stations are reached, appears in a brief submitted by a Committee Representing Natural Gas Industry, which was presented by Mr. William A. Dougherty to the House Committee on Interstate and Foreign Commerce, holding hearings on H. R. 5423, a predecessor bill to the Natural Gas Act (Hearings on H. R. 5423, 74th Cong., 1st Sess., pp. 1786, 1790).

[6] If no undue burden will thereby be placed upon a natural-gas company, the Commission, under Section 7 (a), may direct extension or improvement of transportation facilities and establishment of physical connections, under certain conditions. Though at present East Ohio has no spare capacity, it is, nevertheless, true that it does not provide natural-gas service to all communities in the general territory in which it operates.

Section 7 (c) requires certificates of public convenience and necessity for construction or extension of facilities. Such certificates have thrice been issued to East Ohio (citations in footnote (1), *supra*). And see pp. 9-10, *infra*.

"* * * Provided, however, That after delivery of said gas to a distributing company for distribution to
3911 local consumers, * * * any transmission to such consumers shall be deemed to be intrastate commerce, or in local distribution not subject to the jurisdiction of the Commission." (Hearings on H. R. 5423, 74th Cong., 1st Sess., p. 1668).

The proponent of the amendment, counsel for the National Association of Railroad and Utilities Commissioners, said that it was "drawn in the light of the decision of the United States Supreme Court in East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 470" (Ib. p. 1695).[7] It is highly significant that no such amendment, and no provision paralleling it in form or substance, is to be found in the Natural Gas Act as finally enacted.

Still another contention is that regulation by this Commission will partially duplicate what is characterized as complete regulation by the State of Ohio. That contention apparently serves as premise for a claim that action by this Commission would, in these circumstances, constitute an invasion of the regulatory area assertedly reserved by Congress to the State. But this conclusion is supported by neither the language nor the history of the Act, even if its premise were sound.

Let us, however, examine the premise. There is here no significance to the point, repeatedly made, that East Ohio has no property or activities outside Ohio. Even though that be true, the State of Ohio lacks power to confer upon its Commission authority to require a certificate of public convenience and necessity for a transmission line used solely for transporting out-of-state gas, as for example, East Ohio's 112-mile line connecting with Panhandle.

Any prior doubt as to whether this be so, was re-
3912 solved when Congress provided in Section 7(c) of

[7] The effect of that decision in deciding our jurisdiction over East Ohio was dealt with in *Re The East Ohio Gas Company*, Docket No. G-458, 4 F. P. C. 15, 19; see also, *Re The East Ohio Gas Company*, Docket No. G-115, 1 F. P. C. 586, 591.

the Natural Gas Act for national control of this very matter (Illinois Gas Co. v. Public Service Co., 314 U. S. 498, 506, 510; cf., Colorado-Wyoming Gas Company v. Federal Power Commission, 324 U. S. 626, 629-631). Moreover, it appears from the record that the Ohio Commission does not require the filing of reclassification and original cost studies of gas plant. And even if it did, our jurisdiction would remain unaffected. For, as was said in Connecticut Light & Power Co. v. Federal Power Commission, 324 U. S. 515, 533, with respect to jurisdiction under similar provisions of the Federal Power Act:

"* * * once a company is properly found to be a 'public utility' under the Act the fact that a local commission may also have regulatory power does not preclude exercise of the Commission's functions. Cf. Northwestern Electric Co. v. Federal Power Commission, 321 U. S. 119 * * *."

Again we say that Congress, in the Natural Gas Act, clearly provided jurisdiction over East Ohio. The legislative history of the Act, as well as Sections 5(b), 6, 7, 8, 9, and 10, among others, plainly point to the fact that protection of the public interest was deemed by Congress to make necessary federal regulation of such a company. Our responsibility is equally plain.

Orders Involved

East Ohio complains that, even though it were properly held to be a "natural-gas company," the orders involved here are invalid.

The 1939 orders in Docket No. G-115 required, under authority of Sections 5(b) and 6(b), the furnishing of certain data relating to the cost of transporting gas
3913 from the Ohio River to the City of Cleveland. A then
existing rate controversy between the City of Cleveland and East Ohio has been settled. Part of the requested data has been furnished, but East Ohio elected not to furnish all. It is argued that the remaining data will now serve no useful purpose, that the claimed cost of compli-

ance exceeds $175,000, and that the order is, therefore, arbitrary.

First, we affirm and adopt the treatment in Re The East Ohio Gas Company, 1 F. P. C. 586, 592-595, of objections to the initial 1939 order. Turning to other objections, representatives of the City of Cleveland indicated, during the 1946 hearings, a continuing desire for the cost determination for which the data are sought. When further rate controversy develops, these very data will be useful and can readily be made current. Moreover, these same data must, in large part, be supplied in compliance with the other orders, to which we next turn.

They are the Commission's general accounting orders, issued under Sections 8(a), 10(a) and 16, which require installation of the uniform system of accounts, reclassification and original cost determination, and annual and statistical reports. To these orders, East Ohio objects because the cost of compliance is claimed to exceed $1,500,000, and on the ground that the data sought can have relevancy, if to anything, only to the regulation of its local rates, a function reserved to the State of Ohio.

To sustain these objections, we would have to shut our eyes to all provisions of the Natural Gas Act, save those relating to only rates. For example, uniform accounting is necessary to effective regulation under
3914 Section 7. And original cost is a necessary incident to the establishment and maintenance of such a uniform system. In this connection, the legislative history of the Natural Gas Act indicates that, in 1935, the investment accounts of East Ohio reflected write-ups amounting to $15,454,511.65.[8]

One of the objections to these orders is that requests for accounting data and requirements that accounts be kept may not extend beyond facilities subject to our jurisdiction

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[8] See: "Report on an Examination of Accounts and Records of the East Ohio Gas Co.," Sen. Doc. 92, Part 83, p. 1695 *et seq.* (70th Cong., 1st Sess.); and testimony of a Federal Trade Commission accountant examiner, *ib.*, commencing at p. 630.

under the Act. This argument, however, the Commission has previously considered and rejected (Re Billings Gas Company, et al., 2 F. P. C. 288, 289-290; Re Northwestern Electric Co., 2 F. P. C. 327, 330-331). To the position there taken, we adhere.

As to cost of compliance, that alone is no bar. Furthermore, we believe that effective regulation in the public interest provided for by Congress, the objective of the orders, is justification for legitimate cost of compliance. And, in any event, the unsupported estimate of cost of reclassification and original cost studies is not convincing, for our experience with other companies with greater property investment indicates that this estimate is considerably exaggerated.

Finally, protection of the public interest requires uniform accounting by natural-gas companies, as was contemplated by Congress in the Natural Gas Act. To provide effective regulation of such companies, we must have information available from a uniform system of accounts. Otherwise, such regulation cannot be maintained on a national basis.

3915 CONCLUSION

We have failed, after careful deliberation, to find good cause to depart from our previous findings. In arriving at this conclusion we recognize fully the intention of Congress, as expressed in Section 1(b) of the Natural Gas Act, that local distribution of natural gas and the facilities used therefor shall be exempt from the jurisdiction of this Commission. We are, however, unable to view the operation of a 650-mile pipeline transportation system as a mere incident to local distribution. The finding that East Ohio is, by reason of its operation of this transportation system, a "natural-gas company" will, as we view it, in no manner interfere with the exercise by the State of Ohio of its authority to regulate the operations of the company in its

business of local distribution,—the field of local regulation which the Congress has clearly reserved to the States.

WHEREFORE, the Commission orders that:

(A) The stay of the order of June 25, 1946, granted by the order of August 23, 1946, be, and it hereby is, dissolved.

(B) Paragraph (D) of the order of June 25, 1946, be, and it hereby is, modified by striking the words "the date of this order," appearing in the first line, and substituting therefor, "November 7, 1947".

3916 (C) As thus modified, the order of June 25, 1946, be, and it hereby is, made effective.

By the Commission.

LEON M. FUQUAY,
Secretary.

Date of Issuance: November 7, 1947.

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3919 Filed Dec 3 1947

Application of The East Ohio Gas Company for a Rehearing and Stay.

The East Ohio Gas Company, hereinafter referred to as "East Ohio," defendant herein, being aggrieved by the Commission's order dated November 6, ~~1947~~ and issued November 7, 1947 in the above proceedings and set forth in the Commission's opinion therein designated Opinion No. 158, making effective after a rehearing limited to oral argument the Commission's order of June 25, 1946 therein entitled "Order Requiring Compliance With Orders Heretofore Issued" which held East Ohio to be a "natural-gas company" within the meaning of the Natural Gas Act and directed it to comply with certain orders heretofore
3920 issued by the Commission, hereby applies for a rehearing and stay in respect of such order in accordance with Section 19(a) of the Natural Gas Act.

This application is based upon the following grounds:

I.

Said order issued November 7, 1947 modifies said order of June 25, 1946 only by advancing the date by which certain information must be furnished to the Commission from within 90 days from June 25, 1946 to within 90 days from November 7, 1947 and as so modified makes said order of June 25, 1946 effective. Within 30 days of the issuance of said order of June 25, 1946, to wit, on July 23, 1946, East Ohio filed its application for a rehearing and stay* thereof. Since said order issued November 7, 1947 makes effective said order of June 25, 1946 as aforesaid East Ohio, to avoid repetition, hereby as grounds for this application refers to and adopts as though here rewritten each and several of the representations, statements and grounds of its said application for a rehearing and stay of said order of June 25, 1946.

II.

(a) The Commission in said order issued November 7, 1947 erred in failing to make and give effect to the findings, requested by East Ohio, set forth in its said application for rehearing and stay in respect of said order of June 25, 1946 and shown by undisputed evidence in the record.

(b) The Commission in said order issued November 7, 1947 erred in failing to correct its Finding (15) in said order of June 25, 1946 that East Ohio's transmission lines Nos. 1, 2, 3, 4, 5 and 6 and its Youngstown branch lines "are not, and at all times mentioned herein, were not facilities used for the * * * local distribution of natural gas" and further erred in its finding expressed in said Opinion No. 158 "that East Ohio's 650 miles of transmission pipelines, described herein, are not 'facilities used for' local distribution, * * *."

* The following abbreviations were used in such application and are used herein: Ex.—exhibit; Stip.—Stipulation; R. I.—reference by incorporation to former proceedings; Ohio G. C.—Ohio General Code; Sec.—section; East Ohio—The East Ohio Gas Company; Hope—Hope Natural Gas Company; Commission or FPC—Federal Power Commission; T.—transcript of testimony.

3921 (c) The Commission in said order issued November 7, 1947 erred in not finding and holding that the transmission lines referred to in paragraph (b) above in their entirety are facilities used by and useful to East Ohio solely for the local distribution of natural gas in Ohio within the meaning of Section 1 (b) of the Natural Gas Act; that East Ohio is not a "natural-gas company" as defined in the Natural Gas Act; and that the Commission is without jurisdiction over East Ohio.

(d) The Commission in said order issued November 7, 1947 erred in not finding and holding that the transportation by East Ohio of its own gas through the transmission lines referred to in paragraph (b) above, solely for the purpose of meeting its only public utility obligation, namely, local distribution in Ohio, is "other transportation" within the meaning of Section 1 (b) of the Natural Gas Act; that East Ohio is not a "natural-gas company" as defined in the Natural Gas Act; and that the Commission is without jurisdiction over East Ohio. It further erred in its finding expressed in said Opinion No. 158 "that East Ohio's transportation of out-of-state natural gas in such lines is neither 'other transportation' nor 'local distribution' within the meaning of said Section 1 (b)."

III.

Even though East Ohio were properly held to be a "natural-gas company" within the meaning of the Natural Gas Act, which East Ohio denies, the Commission in said order issued November 7, 1947 nevertheless erred in requiring East Ohio to comply with the Commission's accounting requirements as set forth in its Orders Nos. 69, 69-A and 73 for the reason that said accounting requirements apply equally to all classes of property owned by a "natural-gas company" while the jurisdiction and authority of this Commission by the provisions of Section 1 (b) of the Natural Gas Act do not extend to the local distribution of natural gas, or to the facilities used for such distribution,

or to the production or gathering of natural gas, or to the facilities used for such production or gathering. To the extent that said former orders of this Commission, with which East Ohio is directed to comply by virtue of said order issued November 7, 1947 making effective said order of June 25, 1946, require East Ohio to conform to the accounting requirements of the Commission as set forth in said orders in respect of any facilities or business, other than those relating to the transportation of natural gas in interstate commerce, each of said orders is beyond the power of this Commission and invalid. Each of said
3922 orders should therefore be modified so as to apply only to such transportation property and operations.

IV.

The Commission in said order issued November 7, 1947 making effective said order of June 25, 1946 requires East Ohio to comply with a certain former Commission order in Docket No. G-115 dated February 14, 1939, as modified by an order dated April 14, 1939. These 1939 orders were both occasioned by an application instituted by the City of Cleveland in 1938 in which it was represented to the Commission that it would be helpful to the City of Cleveland in certain rate negotiations and litigation in which it was then engaged with East Ohio to determine on an original cost basis the cost to East Ohio of transporting natural gas from the Ohio River to the Cleveland city gate. Accordingly the Commission's orders required East Ohio to prepare and file a statement of the original cost, as of December 31, 1938, of all facilities then used in transporting gas from the Ohio River to the Cleveland city gate and the cost of all operating expenses attributable to that operation during 1936, 1937 and 1938.

By action of The Public Utilities Commission of Ohio in East Ohio Gas Company v. City of Cleveland, 27 P. U. R. (N. S.) 387 (1939) and affirmance thereof by the Supreme Court of Ohio in The East Ohio Gas Co. v. Public Utilities

Commission of Ohio, City of Cleveland v. Public Utilities Commission (Two Cases), 137 O. S. 225, 35 P. U. R. (N. S.) 158 (1940) the 1937-1939 rate litigation between East Ohio and the City of Cleveland pending at the time of the FPC orders referred to above was finally disposed of. By further action of The Public Utilties Commission of Ohio in The East Ohio Gas Company v. City of Cleveland, 56 P. U. R. (N. S.) 73 (1944) the rate litigation between East Ohio and the City of Cleveland pending subsequent to 1939 was finally disposed of for the period from 1939 through 1946, from which action neither East Ohio nor the City prosecuted any error or appeal. The rate fixed by the Ohio Commission in the latter proceedings has continued and is now the rate paid in Cleveland and there are now no rate controversies in any city served by East Ohio (Ex. 6, p. 22, T. 153).

Since, therefore, as shown by the record herein the controversy which occasioned these orders, directed only to East Ohio and not to all "natural-gas companies," has been completely disposed of; since those orders re-
3923 quest expense data for 1936, 1937 and 1938 and cost data as of December 31, 1938, which are now wholly meaningless dates for any purpose, and since the expense to East Ohio of complying with these orders, if it be held to be a "natural-gas company," would exceed $200,000, we again suggest that the Commission reconsider and now modify said order issued November 7, 1947 making effective said order of June 25, 1946 so as expressly to declare that East Ohio need not comply with the Commission's former order of February 14, 1939, as modified by its order of April 14, 1939.

The Commission's statement in said Opinion No. 158 that representatives of the City of Cleveland indicated a continuing desire for this 1936-38 data is unsupported by the record. Its statement that these very data will be useful and can readily be made current in further rate controversies is also wholly unsupported by the record. The

record shows original cost data to be irrelevant under the Ohio law relating to the matter of regulation of rates. If, however, a further local rate controversy should develop between East Ohio and any of the cities served by it and if the Commission despite Ohio rate law should hereafter be of the opinion on application by any such city that it could usefully require similar or other information from East Ohio, the Commission could then after a hearing make an appropriate and up-to-date order.

Based upon the record herein the present order is arbitrary and unreasonable in that it requires East Ohio to spend more than $200,000 to comply with former 1939 orders to compile data wholly useless and relating to a question of local rates that is long since moot.

V.

(a) The investigation instituted in Docket No. G-115 and the information required by the orders in the above proceedings and the other orders involved are solely for the purpose of compiling information having no possible relevancy to any governmental object except the regulation of East Ohio's rates for the local distribution of gas in Ohio. The orders and any provisions of the Natural Gas Act construed to authorize their issuance therefore constitute an invasion of the powers reserved to the State of Ohio under the Tenth Amendment to the Constitution of the United States and an invalid extension of the powers delegated to the federal government by Article I, Section VIII thereof and are unconstitutional and void.

3924 (b) The investigation instituted and the information required by the above-mentioned orders would result in a compilation of data which can be of no useful purpose even in the regulation of East Ohio's rates for the local distribution of gas in Ohio in view of the Ohio law relating to the matter of regulation of rates. To furnish the same would require an expense to East Ohio of between $1,500,000 and $2,000,000. East Ohio's testimony as to this

expense was in no way challenged. The Commission's statement in said Opinion No. 158 that East Ohio's estimate is "unsupported" and "not convincing" is arbitrary. Under these circumstances insistence by the Commission upon the furnishing of this information, even if the Commission otherwise has statutory and constitutional jurisdiction, is an abuse of its statutory powers and is arbitrary and invalid as an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States and as a deprivation of East Ohio's property without due process of law and a taking of its property for public use without just compensation in violation of the Fifth Amendment thereto.

VI.

When the Commission made its original order herein dated February 14, 1939 in Docket No. G-115, which was supplemented by an order dated April 14, 1939 therein, East Ohio filed its applications for rehearing and after denials thereof promptly filed a petition to review such orders in the Circuit Court of Appeals for the Sixth Circuit. By such appeal East Ohio sought to have it judicially determined whether or not it was a "natural-gas company" within the meaning of the Natural Gas Act and whether the Commission had jurisdiction over it. It was at that time prevented from having this question determined by a motion of the Commission to dismiss the appeal on the ground that the order involving this question was not reviewable. The Circuit Court of Appeals so held in East Ohio Gas Co. v. Federal Power Commission, 115 F. (2d) 285 (1940). East Ohio, if this application is denied, will again promptly file a petition to review in accordance with Section 19(b) of the Natural Gas Act. The record herein does not disclose that anyone has been aggrieved by the delay which has so occurred in securing a judicial determination of East Ohio's status under the Natural Gas Act and does disclose, on the contrary, that East

3925 Ohio would immediately begin to have to incur enormous expense, between $1,500,000 to $2,000,000, to comply with the various Commission orders which it is ordered to comply with by said order issued November 7, 1947. Accordingly we respectfully request that the Commission stay its said order pending determination of this application and, conditioned upon East Ohio filing a petition for review under Section 19(b) of the Natural Gas Act, pending final determination by the courts of such judicial proceeding.

WHEREFORE, East Ohio, respectfully representing that grave errors have been committed in the orders heretofore made in these proceedings and in the order issued November 7, 1947 making the order of June 25, 1946 effective, requests a rehearing, reconsideration and vacation or modification of the Commission's order issued November 7, 1947 and the orders therein referred to and made effective thereby, and further requests that the Commission issue a stay of said order issued November 7, 1947 as set forth above.

Respectfully submitted,

THE EAST OHIO GAS COMPANY,
By JONES, DAY, COCKLEY & REAVIS, by

WILLIAM B. COCKLEY and
WALTER J. MILDE,
1759 Union Commerce Building,
Cleveland 14, Ohio,

WM. A. DOUGHERTY and
C. W. COOPER,
30 Rockefeller Plaza,
New York, N. Y.

December 2, 1947.

3926 VERIFICATION

STATE OF OHIO,
CUYAHOGA COUNTY, ss.

W. G. ROGERS, being first duly sworn, deposes and says that he is Vice President of The East Ohio Gas Company, a corporation and the applicant herein, that he is duly authorized in the premises, that he has read the foregoing application for rehearing and stay and knows the contents thereof, and that the same are true as he verily believes.

W. G. ROGERS.

Sworn to before me and subscribed in my presence this December 2, 1947.

FREDERICK WOODBRIDGE,
Notary Public.

(Notarial Seal)

* * * * * * * * * *

3928 Filed Dec. 8, 1947

Application of The State of Ohio and The Public Utilities Commission of Ohio* for a Rehearing.

The State of Ohio* and The Public Utilities Commission of Ohio, intervenors herein, hereby apply, in accordance with Section (19)a of the Natural Gas Act, for a rehearing in respect to order issued by said Commission on November 7, 1947, in the above proceeding, wherein The East Ohio Gas Company, defendant herein, was declared to be a "natural gas company" within the meaning of the Natural Gas Act and as a result of such finding East Ohio was directed to comply and to conform to certain orders
3929 heretofore issued by said Commission. Ohio has been aggrieved by said orders, hereinabove referred

* The following abbreviations will be used herein:

"Ohio"—The State of Ohio; "P. U. C. O."—The Public Utilities Commission of Ohio; "FPC" or "Commission"—The Federal Power Commission; "Ohio G. C."—Ohio General Code; "East Ohio"—The East Ohio Gas Company.

to, in that the assumption of jurisdiction by this Commission represents an unwarranted and illegal invasion of the powers of Ohio to regulate its local natural gas distributing company, which powers were clearly preserved to Ohio under the provisions of the Natural Gas Act and by the intent of Congress.

In connection with and in support of this application, Ohio respectfully submits:

I

The Commission was in error in failing to make findings and give proper consideration to the following undisputed facts as set forth in the record, to-wit:

1. The prior and existing jurisdiction of Ohio over local natural gas distributing companies, covering authority to regulate all phases of such utility operations. The Ohio Public Utilities Act defines as a public utility, subject to its jurisdiction, a company "engaged in the business of supplying natural gas for lighting, power or heating purposes to consumers in this state," (Ohio, G. C., Sections 614-2 and 614-2a).

Other Ohio statutes covering utility regulations are as follows:

(1) Ohio G. C., Section 614-4, declares that P. U. C. O. has jurisdiction and power and duties to regulate every public utility, "the plant or property of which lies wholly
within this state", to regulate companies operating
3930 said property and the records and accounts of the
business thereof done within this state, and

(2) P. U. C. O. is given the power of general supervision, (Ohio G. C., Section 614-8),

(a) to examine records (Ohio G. C., Section 614-7).

(b) to prescribe systems of accounts (Ohio G. C., Section 614-10),

(c) to compel the furnishing of adequate facilities (Ohio G. C., Section 614-13),

(d) to prevent rebates and discriminations (Ohio G. C., Sections 614-14 and 614-15),

(e) to fix and order changes in rates other than those fixed by municipal ordinance (Ohio G. C., Section 614-20 et seq.),

(f) to hear appeal from and set aside ordinance rates, and fix substitute rates (Ohio G. C., Section 614-44 et seq.),

(g) to prescribe form of annual reports (Ohio G. C., Section 614-48),

(h) to prescribe proper depreciation changes and require the setting up of a depreciation fund (Ohio G. C., Section 614-49),

(i) to authorize the issue of securities (Ohio G. C., Section 614-53),

(j) to regulate the purchase or sale of property (Ohio G. C., Section 614-60),

(k) and many other regulatory powers.

3931 2. East Ohio has been under the jurisdiction of P. U. C. O. for approximately 36 years and said regulatory jurisdiction has extended to and included all phases of public utility regulation.

3. Ohio has continuously regulated said East Ohio during said period.

4. The matters presently the subject of the Commission's recent orders in this cause have within the past 12 years been the subject of three complete investigations, each of which included a detailed valuation of the entire production, transmission and distribution properties of East Ohio.

5. Rates for all services, domestic and industrial, are fixed either by ordinance passed by a municipal council and accepted by East Ohio, as provided by Ohio G. C., Sections 3982 and 3983, or by P. U. C. O. in an initial proceeding by the utility under Ohio G. C., Section 614-20 et seq., or by appeal from a municipal ordinance under Ohio G. C., Section 614-44 et seq.; and in all cases, regardless of how the rate is fixed or determined, a schedule setting forth said

rates and charges, both domestic and industrial, is filed with P. U. C. O.

6. All the property of East Ohio used in the production, storage, transmission or distribution is located within the territorial boundaries of Ohio, and such facilities are used solely for local distribution purposes.

7. P. U. C. O. has designated and regulates the system of all accounts of East Ohio, including such accounts, as
3932 production, storage, transmission or distribution; no public utility service is actively conducted by East Ohio except under the supervision and jurisdiction of Ohio, and it furnishes no public utility service nor operates public utility property except under supervision and jurisdiction of Ohio.

8. The information and data requested by FPC in its order to East Ohio would result in the duplication of information already many times required to be furnished and presently on file with P. U. C. O.

9. If East Ohio is forced to comply with FPC's orders of February 14, 1939, and April 14, 1939, it will necessitate the expenditure of approximately $200,000; the expenditure of such a sum for such demanded information would serve no useful purpose; there is no present need for such information; there is no present rate litigation in Ohio, wherein such information could be put to use.

10. The cost, estimated to be approximately $1,500,000, to East Ohio (and to Ohio gas consumers) to be expended in the company's compliance with the Commission's orders Nos. 69, 69-A and 73, requiring reclassification and statement of original cost of all of East Ohio's properies, including general, distribution, production and transmission, is not justified in this record nor is there evidence that said expenditure will result in any useful purpose to the gas consumers in Ohio.

II

1. In addition to errors of FPC herein in failing to
3933 make findings and give consideration to the above (1

to 10) facts, said Commission erred in not finding and holding that the transmission lines, Nos. 1, 2, 3, 4, 5, 6, and 7, and Youngstown branch of East Ohio, are facilities used and useful solely for local distribution of natural gas within the meaning and intent of Section 1(b) of the Natural Gas Act and that the Commission is without jurisdiction over East Ohio.

2. The Commission erred in finding that said transmission lines, above referred to, are not "facilities used for" local distribution.

3. The Commission erred in finding that East Ohio is "engaged in the transportation of natural gas in interstate commerce", and that it (East Ohio) is, therefore, a "natural gas company" within the meaning of the Natural Gas Act (Sections 1(b) and 2(6)).

4. The Commission erred in finding that East Ohio is engaged in the "business" of transportation under Section 1(a) of the Natural Gas Act when it transports neither for sale for resale nor for others for hire.

5. The Commission erred in finding that the legislative history as to the intent of the Natural Gas Act, as well as Sections 5(b), 6, 7, 8, 9 and 10, plainly points to the fact that protection of public interest was deemed by Congress to make necessary federal regulation of East Ohio.

6. The Commission erred in not finding and holding that movement of natural gas owned by East Ohio in the
3934 above-mentioned lines, solely to meet local regulated distribution obligations in Ohio, is neither "other transportation" nor "local distribution" within the meaning and intent of Section 1(b) of the Natural Gas Act and that the Commission is without jurisdiction over East Ohio.

7. The Commission erred in ordering East Ohio to comply with all of the Commission's accounting system as set out in its orders Nos. 69, 69-A and 73, for the reasons that said accounting system applies to all classes of property owned and operated by East Ohio and since said Commission's use of jurisdiction does not (under Section 1(b)

of the Natural Gas Act) extend to local distribution, or to facilities for such local distribution, or to production or gathering, or to the facilities used for such production or gathering, East Ohio is being compelled to set up two separate expensive accounting systems to regulate identical property, the first system of accounts as required and ordered by P. U. C. O. under Ohio law, and the second system of accounts as ordered by the Commission, contrary to the Natural Gas Act and the intent of Congress.

8. The Commission erred in its attempt to assume authority over East Ohio as a natural gas company and over its accounting system on the jurisdictional test that out-of-state gas is carried in its transmission lines or that the pressure of said out-of-state gas is controlled by contract. The Commission erred in not using the test of whether said transmission properties are local distribution facilities.

3935 9. The Commission erred in not giving consideration to the historical intent of Congress in enacting the Natural Gas Act, which declares that FPC shall not have jurisdiction over facilities used in local distribution of natural gas, and that the Commission's authority "extends only to those matters which were not subject to regulation by the states".

10. The Commission erred in exceeding its jurisdiction in attempting to impose dual regulation upon a local natural gas company presently under Ohio's jurisdiction.

11. The Commission erred in exceeding its jurisdiction in attempting to extract information from a local natural gas distributing company where the avowed purpose of such information is to aid in the setting of a local burner rate contrary to the purpose and intent of the Natural Gas Act.

12. The Commission erred in its assumption that the facts and its findings in this cause bring East Ohio within the purview of the Natural Gas Act and, therefore, subject to its jurisdiction for accounting purposes or otherwise.

13. The Commission erred in failing to find that Ohio has been excluded by the Natural Gas Act of exclusive control and jurisdiction over the property and accounting systems, herein the subject of this cause; in failing to find and describe accurately the bounds of jurisdiction of the FPC; and in failing to find that the jurisdiction of Ohio had been properly considered and that the intent of
3936 the Natural Gas Act was to grant deliberate overlapping of authority.

III

1. The orders of the Commission in this cause and the provisions of the Natural Gas Act construed to be the basis for such orders, constitute an unwarranted and illegal invasion of the powers reserved to Ohio under the Tenth Amendment to the Constitution of the United States and an unwarranted and invalid extension of the powers delegated to the federal government by Article I, Section 8, thereof, and are unconstitutional and void.

2. The orders of FPC in this cause required the expenditure of funds upward to $2,000,000 for which the record herein shows no useful purpose nor evidence that would substantiate any assumption of a useful purpose other than a veiled attempt to participate in the setting of a local distribution rate for natural gas not subject to federal regulation. The assumption of jurisdiction by the Commission for such purposes is unwarranted, arbitrary, invalid and in violation of the Fourth Amendment to the Constitution of the United States as an unreasonable search and seizure and as a means of depriving a local natural gas distribution company of property under the control of Ohio without due process of law, and a taking of its property for public use without just compensation in violation of the Fifth Amendment of the Constitution of the United States.

Wherefore, the State of Ohio and The Public Utili-
3937 ties Commission of Ohio respectfully submit that serious errors have been committed in the order

made herein, request a rehearing for the purpose of reconsidering and vacating the Commission's order of November 7, 1947, and the orders therein included and referred to.

Respectfully submitted,

Hugh S. Jenkins,
Attorney General of Ohio,
State House, Columbus 15, Ohio.

Harry G. Fitzgerald, Jr.,
Assistant Attorney General,
State Office Bldg., Columbus 15, Ohio,
Attorneys for the State of Ohio and The Public Utilities Commission of Ohio.

December 2, 1947.

* * * * * * * * * *

3939 December 30, 1947

Order Modifying Orders of June 25, 1946 and November 7, 1947, and Denying Applications of The East Ohio Gas Company for Rehearing and Stay and of Intervenors for Rehearing.

It appearing to the Commission that:

(a) On December 3, 1947, respondent and defendant The East Ohio Gas Company ("East Ohio"), filed an application for a rehearing of the Commission's order issued on November 7, 1947, in these proceedings and for a stay of said order of November 7, 1947.

(b) On December 8, 1947, intervenors The State of Ohio and The Public Utilities Commission of Ohio filed an application for a rehearing of said order of November 7, 1947;

3940 (c) Paragraph (A) of the order in these proceedings of June 25, 1946, made effective by the order of November 7, 1947, requires East Ohio to furnish certain data relating to the cost of transporting natural gas from the Ohio River to the City of Cleveland as required by an

order herein of February 14, 1939, as supplemented by an order herein of April 14, 1939;

(d) The foregoing requirements in large part are duplications of requirements of Orders Nos. 69, 73 and 69-A, issued on November 3, 1939, April 9, 1940 and March 3, 1942, respectively, concerning the preparation and filing of accounting and original cost data; and insofar as no duplication exists, the furnishing of the information referred to in paragraph (c) hereof would presently serve little useful purpose;

(e) Good cause exists for modifying the orders in these proceedings of June 25, 1946, and November 7 1947, as hereinafter specified, and in all other respects denying the applications of East Ohio and the aforementioned intervenors;

The Commission orders that:

(A) The aforementioned order dated June 25, 1946, be and the same is hereby modified by striking out the whole of paragraph (A) thereof; and the aforementioned order dated November 7, 1947, be and the same is hereby vacated insofar as it makes effective said paragraph (A) of the order of June 25, 1946;

(B) The aforementioned applications of East Ohio and intervenors The State of Ohio and The Public Utilities Commission of Ohio be and the same are in all other respects hereby denied.

By the Commission.

Leon M. Fuquay,
Secretary.

Date of Issuance: December 30, 1947.

197 United States Court of Appeals for the District of Columbia Circuit

Filed Feb. 14, 1949, Joseph W. Stewart, Clerk

No. 9741

THE EAST OHIO GAS COMPANY, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT

STATE OF OHIO, THE PUBLIC UTILITIES COMMISSION OF OHIO, INTERVENORS

On Petition for Review of Orders of the Federal Power Commission

Argued December 9, 1948 Decided February 14, 1949

Mr. William B. Cockley, with whom *Messrs. Walter J. Milde, Wm. A. Dougherty, C. W. Cooper* and *Sturgis Warner* were on the brief, for petitioner. *Mr. Warren S. Ege* also entered appearance for petitioner.

Mr. William S. Tarver, Assistant General Counsel, with whom *Messrs. Bradford Ross*, General Counsel, *Louis W. McKernan, Bernard A. Foster, Jr.*, and *Howell Purdue*, Attorneys, Federal Power Commission were on the brief, for respondent.

Messrs. Hugh S. Jenkins, Attorney General, and *Harry G. Fitzgerald, Jr.*, Assistant Attorney General, were on the brief for Intervenors State of Ohio and The Public Utilities Commission of Ohio, urging reversal.

Before EDGERTON, CLARK and PRETTYMAN, JJ.

CLARK, *J.*: The case is before this court on the petition of the East Ohio Gas Company (hereinafter alternatively referred to as East Ohio or as petitioner) for review of certain orders of the Federal Power Commission (referred to hereinafter as the Commission or the respondent). The orders sought to be reviewed found East Ohio to be a "natural-gas company" within the meaning of the Natural Gas Act of 1938, as amended,[1] subject to the jurisdiction of the Commission and ordered East Ohio: (1) to comply with all previous general accounting orders of the Commission applicable to "natural-gas companies"; (2) to comply with all previous Com-

[1] 52 Stat. 821 (1938), 15 U. S. C. § 717 *et seq.* (1946).

mission orders requiring the filing of annual reports; and (3) to file with the Commission within 90 days the data, statements
198 and reports required by previous orders insofar as it reasonably could and to inform the Commission when the remainder could be filed.

During all the proceedings before the Commission the effectiveness of the orders here under review was stayed by the Commission in order to preserve the *status quo*. Similarly, upon petition of East Ohio, and the respondent having filed consent thereto, this court granted a stay pending its decision on review.

Although the petitioner and the respondent differ radically as to the interpretation of the facts of the case and their net effect, as might be expected, there is no controversy as to the material facts themselves. East Ohio is an Ohio corporation with its principal place of business in Cleveland, Ohio. The very heart of the instant controversy is the definition of the nature of East Ohio's business, petitioner and the intervenors claiming that East Ohio is solely engaged in the business of direct, local distribution of natural gas in the State of Ohio, and respondent claiming that petitioner is in the business of transporting gas in interstate commerce. Postponing, for the moment, further discussion of that critical question, it is certain that all property and facilities owned and operated by East Ohio lie within the physical boundaries of the State of Ohio, that East Ohio distributes natural gas in Ohio by means of an extensive pipeline system,[2] and that none of East Ohio's pipelines crosses state lines. Further, it is uncontroverted that petitioner makes no sales of any kind to any other company for resale purposes and that none of the gas sold by petitioner is consumed outside of Ohio, that is, none of the gas in the pipelines of East Ohio flows out of the State of Ohio.

Petitioner's sources of natural gas are threefold. As of 1945,[3] petitioner got 62% of its gas from the Hope Natural Gas Company

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[2] According to the briefs of petitioner and of intervenors, East Ohio's pipeline property, using the accounting classification required by the Public Utilities Commission of Ohio, was, in 1945, as follows:

	Miles
Distribution lines	5,490
Storage lines	672
Field lines	1,011
Transmission lines	903
Total	8,076

[3] The Commission proceedings from which the orders under review arose commenced in early 1946. The statistics presented before the Commission were necessarily those pertaining to petitioner's property and activities during the preceding year and all facts and figures contained in this opinion, unless otherwise specified, refer also to the year 1945.

(hereinafter called Hope), 23% from the Panhandle Eastern Pipe Line Company (hereinafter called Panhandle), and 15% from native Ohio fields.[4] The gas procured by East Ohio from Hope and from Panhandle is concededly gas from sources outside the State of Ohio (principally from West Virginia, Texas, Oklahoma and Kansas). The gas procured from Hope first enters petitioner's pipeline system principally at two points *in Ohio* known as Pipe Creek Station and Clarington Station, both on the Ohio side of the Ohio River. Panhandle gas first connects with and joins the East Ohio system at Maumee, Ohio, a point about 40 to 50 miles east of the western boundary of Ohio. The first point locally-produced gas en-
199 ters the pipelines of petitioner is a point in Harrison County,
Ohio, about 40 miles from the Ohio-West Virginia state line. It is established by the record and found by the Commission that East Ohio serves more than 551,000 consumers in 69 north-eastern Ohio communities having an estimated total population of over 2,000,000 people. The total sales figure of petitioner in 1945 was 77,428 million cubic feet (Mcf).[5] Much is made by the Commission of the fact that petitioner receives its gas from both Hope and Panhandle at high pressures which, in most cases, are sufficient to propel the gas through petitioner's large trunk lines to their ultimate destination without repumping. East Ohio does not deny that this is so. On the other hand, the Commission, both in its several orders and in its brief in this case, passes rather lightly over the fact which we consider extremely important, namely, that East Ohio has long been subject to complete regulation by the Public Utilities Commission of Ohio, intervenor herein.

The Ohio Commission was created in 1911. Ever since that date it has repeatedly and continuously exercised its regulatory powers over all the business activities and property of petitioner. This regulation has included the setting of numerous rates, the supervision of acquisitions and sale of property and security issues, the control of accounting practices, inauguration and termination of service, examining service complaints, and requiring the submission of detailed reports to the Ohio Commission. Abundant state statutory authority exists for this regulation by the Ohio Commission [6] and the state

[4] These three percentages, set forth in even numbers for convenience, are accurate within .5%.

[5] The total sales figure is broken down in the following manner: Sold to domestic consumers—46,674,457 Mcf; Sold to industrial consumers—30,126,754 Mcf; and Field sales—627,196 Mcf. Field sales are made from the Ohio producing fields and the gas is entirely consumed in Ohio.

[6] Intervenors, the State of Ohio and the Public Utilities Commission of Ohio, have provided us with excerpts from the Ohio General Code relating to public utility regulation. These excerpts are in pamphlet form, printed in 1946. We have examined the cited portions of the Ohio General Code

regulation authorized is mandatory, not permissive. As of the time of the hearings before the Commission in this case there had been a total of 258 formal regulatory proceedings before the Ohio Commission involving East Ohio. There can be little doubt that petitioner is now and has been very thoroughly and completely regulated by the Ohio Commission.

Since numerous prior proceedings shed some light on the issue in the present case, it is deemed necessary to discuss briefly those proceedings at this point. The Natural Gas Act became law on June 21, 1938. In October of the same year, the City of Cleveland, then engaged in a rate controversy with East Ohio before the Ohio Commission, filed a petition with respondent Commission praying for an investigation of East Ohio's cost of transportation of gas from the Ohio River to the Cleveland city gate. The Cleveland petition also asked that East Ohio be ordered to file an inventory of its property devoted to the transportation of natural gas and a statement of the original cost thereof. On February 14, 1939, the Commission issued an order in which the Commission found East Ohio to be a "natural-gas company" within the meaning of the Act and ordered East Ohio to file an inventory and statement of original cost of its property. This order was entered on the Commission's own motion and without hearing. East Ohio's application for a hearing, rehearing
200 and stay of that order on the ground that its transportation was incident to local distribution having been unsuccessful, it filed a petition for review in the United States Circuit Court of Appeals for the Sixth Circuit (now the United States Court of Appeals for the Sixth Circuit). That court dismissed the petition for want of jurisdiction, it being the opinion of the court that the order was preliminary and not reviewable.[7] On three occasions since that dismissal, East Ohio applied for, and was granted by the Commission, certain certificates concerning its operation. In each of these three applications East Ohio asked in the alternative that the Commission declare that East Ohio is not a "natural-gas company" within the meaning of the Act. The Commission each time denied the alternative request. No judicial review was sought of any of these three certificate proceedings, it being the position of East Ohio that it was not then a party aggrieved by the orders granting the certificates to it so as to justify the seeking of judicial review.[8] Petitioner further asserts that prudence required that it

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contained therein (particularly §§ 614-2a, 614-4, 614-8, 614-10, 614-48, and 614-60) and find them definitely applicable to East Ohio.

[7] *East Ohio Gas Co.* v. *Federal Power Commission*, 115 F. 2d 385 (1940).

[8] Section 19 (b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U. S. C. § 717r (b) (1946), provides for judicial review of Commission orders by "any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding."

apply for these certificates but that it has otherwise never voluntarily submitted to the jurisdiction of the Commission and that it has never otherwise complied with any of the Commission's general orders, including those now under review.

The order or orders presently under review require petitioner's complete submission to the jurisdiction of the respondent and further require, as we have seen above, the preparation of annual financial and statistical reports covering *all* of petitioner's properties and operations, year by year, since 1939. By these orders East Ohio is also required to change its entire accounting system for all of its properties so as to conform to the accounting system prescribed by the Commission, namely, one subscribing to the "original cost" theory of accounting. Petitioner claims, and it is uncontroverted, that the cost to petitioner of compliance with the orders being reviewed would now be between $1,500,000 and $2,000,000.[9]

The State of Ohio and the Public Utilities Commission of Ohio, both parties to the proceedings below, have been allowed to intervene here and both support the contentions of East Ohio.

The Natural Gas Act, which controls the disposition of the present case, commences with the declaration that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest" and hence subject to federal regulation.[10] Immediately thereafter, Section 1 (b) of the Act provides as follows:

> "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other
> 201 use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.*"[11] (Emphasis supplied.)

Section 2 of the Act, containing definition of terms used in the Act, reads in pertinent part as follows:

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[9] In this regard, the Commission, in its opinion and order of November 6, 1947, states that: ". . . the unsupported estimate of cost of reclassification and original cost studies is not convincing, for our experience with other companies with greater property investment indicates that this estimate is considerably exaggerated."

[10] 52 Stat. 821 (1938), 15 U. S. C. § 717(a) (1946).

[11] 52 Stat. 821 (1938), 15 U. S. C. § 717(b) (1946).

"When used in this Act, unless the context otherwise requires—

*   *   *   *   *   *   *

"(6) 'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

"(7) 'Interstate commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States." [12]

It was the conclusion of the Commission below, and it is its present contention on appeal, that because East Ohio owns and operates about 650 miles of large-diameter, high-pressure pipeline which connect up with those of Panhandle and Hope, which 650 miles represents about 8% of the total miles of pipeline owned and operated by East Ohio, it (East Ohio) is a natural-gas company 'engaged in the transportation of natural gas in interstate commerce" under Section 2(6) of the Act, *supra,* and thus subject to Commission jurisdiction. We do not agree with the Commission in this respect. Further, we do not believe that the above-quoted portions of the Act either expressly or impliedly include, or were intended to include, the above-mentioned activities of petitioner. The Act says that a natural-gas company is one which is engaged in the transportation of natural gas in interstate commerce and it defines interstate commerce, for purposes of administration of the Act, as "commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof." We think it obvious that East Ohio does not engage in the transportation of natural gas in interstate commerce by the very definition of such commerce provided in the Act. Moreover, the Act, in Section 1(b), *supra,* expressly states that it shall *not* apply "to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." Not only does East Ohio produce or gather natural gas, but it strongly urges, and we believe the previously discussed facts clearly demonstrate, that it is engaged *solely* in the local distribution of natural gas to local consumers. *All* of its property, including the 650 miles of high-pressure lines, is devoted to that sole purpose. Thus, once again, the very words of the Act exclude petitioner from its administration.

[12] 52 Stat. 821-2 (1938), 15 U. S. C. §§ 717a (6) and (7) (1946).

In holding as we do that petitioner herein is not engaged in the transportation of natural gas in interstate commerce within
202 the meaning of the Act, we are not unaware of the modern trend of judicial opinion toward great expansion of federal powers under the ever-broadening concept of what constitutes interstate commerce.[13] However, where, as here, Congress has spoken explicitly and has, we must assume, purposefully provided an express definition of interstate commerce in the very Act which governs in this case, we take it to be not only the logical but the proper course for us to be governed by that express definition, in the absence of constitutional prohibitions, and not to search elsewhere for definition among *judicial interpretations* of the concept of interstate commerce.[14]

Sufficient has been said to support our conclusion that respondent Commission lacks jurisdiction over East Ohio and hence that the orders under review herein must be reversed insofar as they require compliance by East Ohio. Since, however, both petitioner and respondent rely heavily on the so-called legislative history of the Act as showing the intent of Congress at the time of the enactment of the Natural Gas Act, we deem it desirable to discuss briefly our view of the intent of Congress, bearing in mind constantly that any attempt to probe the collective mind of Congress as of a given time is at best speculation aided only by such written reports and accounts of committee proceedings as are available in the form of Senate and House documents, reports, and resolutions and in the form of excerpts from the *Congressional Record* and in other matters of public record. Fortunately for this court, the legislative history of the Natural Gas Act is not a new subject, it having received rather thorough treatment in several opinions of the Supreme Court. In one of those opinions, *Public Utilities Commission of Ohio et al* v. *United Fuel Gas Co. et al.*, 317 U. S. 456, 63 Sup. Ct. 369, 87 L. Ed. 396 (1943), Mr. Justice Frankfurter, speaking for the majority, said:

> "It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be *complementary in its operation to that of the states, without any confusion of functions.* The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, *to the extent defined in the Act*, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual

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[13] See Humes, *Trend of Decisions Respecting the Power of Congress to Regulate Interstate Commerce* (1940) 26 A. B. A. Journal 846, and cases cited therein.

[14] *Cf. Border Pipe Line Co.* v. *F. P. C.*, 171 F. 2d 149 (App. D. C. 1948).

system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong., 2d Sess., pp. 1-3; H. Rep. No. 709, 75th Cong., 1st Sess., pp. 1-4; Sen. Rep. No. 1162, 75th Cong., 1st sess."[15] (Emphasis supplied.)

In another of those opinions, *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana et al.*, 332 U. S. 507, 68 Sup. Ct. 190 (1947), Mr. Justice Rutledge, speaking for a unanimous Court, said:

"The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary,
203 perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation *to supplement and reinforce it in the gap created by the prior decisions.* [Footnote reference omitted] The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. This appears not merely from the situation which led to its adoption and the legislative history, including the committee reports in Congress cited above, but most plainly from the history of § 1 (b) in respect to the changes which took place in reaching its final form."[16] (Emphasis supplied.)

It is clear from the foregoing that the plain intent of Congress in enacting the Natural Gas Act, as interpreted by the Supreme Court, was to fill in the gap in regulation of the natural gas industry by supplementing existent state regulation with federal regulation of activities beyond the scope of regulatory authority of the state commissions. Viewed in this light, we deem it abundantly manifest that the Act was never intended to confer jurisdiction over such a company as East Ohio since that company was already completely and validly regulated by the Ohio Commission long prior to the passage of the Act. Stated somewhat differently, the Act does not apply to petitioner, and in fact expressly excludes it, there being no regulatory gap to be filled in. All of the gas coming to East Ohio from out of state, gas furnished primarily by Hope and Panhandle, is already completely subject to federal regulation and comes to East Ohio at a rate set by the federal commission. There is thus obviously no gap in regulation in this case and the attempted assumption of jurisdiction by the federal commission in this instance, far from supplementing and reinforcing, constitutes unnecessary,

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[15] 317 U. S. at page 467.

[16] 332 U. S. at pages 517-8.

undesirable and unintended usurpation of state regulatory authority which cannot be justified by either the terms of the Act or its legislative history.

To show that the Federal Power Commission itself had complete understanding of the purpose of the Act just prior to its passage, we need only to quote from a statement made by Dozier A. DeVane, Solicitor of the Federal Power Commission, before a subcommittee of the House Committee on Interstate and Foreign Commerce in 1936, as follows:

> "The whole purpose of this bill is to bring under Federal regulation the pipe lines and to leave to the State Commissions control over distributing companies and over their rates, *whether that gas moves in interstate commerce or not.*" [17] (Emphasis supplied.)

Finally, we are not required to speculate as to the cost to East Ohio of compliance with the Commission orders under review, for if, as we hold herein, the Commission lacks jurisdiction to enter those orders, they are, of course, a nullity as to East Ohio. We therefore reach no decision as to the reasonableness or constitutional validity of the orders. Nor do we deem it of any significance that
204 East Ohio applied for and received certificates in the past from respondent Commission, since no actions of either party, either voluntary or involuntary, can confer jurisdiction where it otherwise does not exist and where, as we have seen, the Act expressly prevents the attachment of jurisdiction and lays down the jurisdictional limits beyond which the Commission shall not trespass.

Accordingly, the orders involved herein, insofar as they purport to pertain to East Ohio, are

Reversed.

EDGERTON, J., *dissenting:* The present petitioner was the appellant in *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U. S. 465 (1931). The Supreme Court said unanimously (p. 470): "The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with its local systems is essentially national—not local—in character and is interstate commerce within as well as without that State. The mere fact that the title or the custody of the gas passes while it is

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[17] Hearing before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, Seventy-Fourth Congress, Second Session, on H. R. 11662 (a predecessor bill to that which ultimately became law as the Natural Gas Act), at page 24.

en route from State to State is not determinative of the question where interstate commerce ends." *Cf. Southern Natural Gas Corp. v. Alabama*, 301 U. S. 148, 154 (1937).

Congress passed the Natural Gas Act in 1938. The Supreme Court has said unanimously: "There is nothing in the terms of the Act or in its legislative history to indicate that Congress intended that a more restricted meaning be attributed to the phrase 'in interstate commerce' than that which theretofore had been given to it in the opinions of this Court." *Interstate Natural Gas Co., Inc. v. Federal Power Commission*, 331 U. S. 682, 688 (1947).

205 United States Court of Appeals for the District of Columbia Circuit

Filed Feb. 14, 1949, Joseph W. Stewart, Clerk.

January Term, 1949.

No. 9741

THE EAST OHIO GAS COMPANY, PETITIONER,

vs.

FEDERAL POWER COMMISSION, RESPONDENT

STATE OF OHIO, THE PUBLIC UTILITIES COMMISSION OF OHIO, INTERVENORS

On Petition for Review of Orders of the Federal Power Commission

Before: EDGERTON, CLARK and PRETTYMAN, JJ.

Judgment and Decree

This cause came on to be heard on the transcript of the record from the Federal Power Commission, and was argued by counsel. On consideration, whereof, It is now here ordered, adjudged and decreed by this Court that the orders of the said Federal Power Commission on review in this cause be, and the same are hereby, reversed insofar as they purport to pertain to petitioner, The East Ohio Gas Company, and that this case be, and it is hereby, remanded to the said Federal Power Commission for further proceedings not inconsistent with the opinion of this Court.

Per Circuit Judge Clark.

Dated February 14, 1949.
Dissenting opinion by Circuit Judge Edgerton.

206 In the United States Court of Appeals for the District of Columbia Circuit

Filed Mar. 22, 1949. Joseph W. Stewart, Clerk

No. 9741

THE EAST OHIO GAS COMPANY, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT

STATE OF OHIO, THE PUBLIC UTILITIES COMMISSION OF OHIO, INTERVENORS

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition for writ of certiorari to the Supreme Court of the United States in the above-entitled cause, and include therein the following:

1. Joint Appendix to Petitioner's Brief.
2. Opinion.
3. Judgment.
4. This Designation.
5. Clerk's Certificate.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Respondent.

207 *Certificate of Service*

I hereby certify that I have this day served a copy of the Designation of Record and a copy of the Motion on each of the following persons by mailing copies to them at their business addresses:

Sturgis Warner, Esquire, Warren S. Ege, Esquire, 1435 E Street, N. W., Washington.

William A. Dougherty, Esquire, 30 Rockefeller Plaza, New York, N. Y.

William B. Cockley, Esquire, 1759 Union Commerce Building, Cleveland 14, Ohio, Counsel for The East Ohio Gas Co.

The Attorney General of Ohio, State House, Columbus 15, Ohio, Counsel for: State of Ohio, The Public Utilities Commission of Ohio, Interveners.

Dated: March 18, 1949.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioner.

208 United States Court of Appeals for the District of Columbia Circuit

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, formerly United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered 1 to 207, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and the proceedings of the said Court of Appeals as designated by counsel in the case of: The East Ohio Gas Company, Petitioner, v. Federal Power Commission, Respondent; State of Ohio, Public Utilities Commission of Ohio, Intervenors. No. 9741, January Term, 1949, as the same remain upon the files and records of said Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this twenty-ninth day of March, A. D. 1949.

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia Circuit. (Seal.)

209 In the Supreme Court of the United States, October Term, 1948

No. —

FEDERAL POWER COMMISSION, PETITIONER,

v.

THE EAST OHIO GAS COMPANY, RESPONDENT;

STATE OF OHIO, THE PUBLIC UTILITIES COMMISSION OF OHIO, INTERVENORS

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties hereto that:

1. For the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining the case on the merits, the printed record shall consist of the following:

(a) Joint Appendix.

(b) The proceedings had before the United States Court of Appeals for the District of Columbia Circuit.

2. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia Circuit to file with the Clerk

of the United States Supreme Court the entire transcript of record in the United States Court of Appeals for the District of Columbia Circuit, and any of the parties may refer in their briefs and arguments to said transcript of record, including any part which has not been printed.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioner.

Dated: March, 1949.

210 STURGIS WARNER,
WARREN S. EGE,
1435 K Street N. W.,
Washington, D. C.
WILLIAM A. DOUGHERTY,
30 Rockefeller Plaza,
New York, N. Y.
WILLIAM B. COCKLEY,
1759 Union Commerce Building,
Cleveland 14, Ohio,
Counsel for The East Ohio Gas Company.
HERBERT S. DUFFY,
The Attorney General of Ohio,
State House,
Columbus 15, Ohio,
Counsel For State of Ohio, The Public Utilities Commission of Ohio, Intervenors.

KENNETH B. JOHNSTON,
Asst. Attorney General.
HARRY G. FITZGERALD, JR.,
Special Counsel.

MARCH 31, 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949 831362 578

Order allowing certiorari

Filed June 20, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Burton took no part in the consideration or decision of this application.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

EAST OHIO GAS COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on February 14, 1949.

OPINIONS BELOW

The opinion of the Federal Power Commission (R. 170-180) is reported at 74 PUR(NS) 256. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 197-206) is not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on February 14, 1949 (R. 206). The jurisdiction of this Court is invoked under Section 19

(b) of the Natural Gas Act and under 28 U. S. C. 1254(1).

QUESTION PRESENTED

The East Ohio Gas Company owns and operates in the State of Ohio natural-gas transmission pipe lines which connect with the West Virginia transmission lines of Hope Natural Gas Company, an affiliate, at the Ohio-West Virginia state line and with the interstate pipe-line system of Panhandle Eastern Pipe Line Company at Maumee, Ohio. East Ohio purchases 85% of the natural gas handled by it from Hope and Panhandle, which transport it from sources outside Ohio to the points of connection with East Ohio's transmission pipe lines. East Ohio takes delivery of the gas at these points and transports it by means of its high-pressure transmission pipe lines to its local distribution systems in Ohio. The main question presented is whether, by virtue of its ownership and operation of these transmission pipe lines, East Ohio is engaged in "interstate commerce" within the meaning of Section 2(7) of the Natural Gas Act and hence is a "natural-gas company," subject to the Federal Power Commission's jurisdiction under that Act.[1]

[1] A subsidiary question presented is whether, assuming East Ohio is a natural-gas company, the Commission's directions that East Ohio comply with its general accounting orders, and file annual reports, are arbitrary, unreasonable and invalid under the Natural Gas Act and the Constitution. The court below, in view of its disposition of the main question, found it unnecessary to pass on this question.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act of 1938 (52 Stat. 821, as amended by 56 Stat. 831, 15 U. S. C. 717 *et seq.*) are set forth in the Appendix, *infra*, pp. 21-26.

STATEMENT

On its own motion and on the complaint of the City of Cleveland, Ohio, the Federal Power Commission (Commission) on February 14, 1939, instituted an investigation into the cost of transporting natural gas by The East Ohio Gas Company (East Ohio) from the Ohio River to the city gate of Cleveland and directed the company to file an inventory and a statement of the original cost of its property used and useful in such transportation (R. 100-103, 130). The Commission denied East Ohio's application for hearing, rehearing and stay of this order (R. 131)[2] (1 F. P. C. 586, 595) and on February 3, 1943, it ordered a hearing, on a date there fixed, to determine whether East Ohio was a "natural-gas company" (R. 134), which hearing, however, was later postponed until further order of the Commission (R. 134).

Meanwhile, three Ohio cities (Euclid, Cleveland and Lakewood), in 1942, filed complaints with the Commission praying that the Commission redetermine East Ohio to be a "natural-gas company"

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[2] East Ohio's petition for review of this denial was dismissed by the Court of Appeals for the Sixth Circuit on the ground that the Commission's order was preliminary and not reviewable (R. 132). *East Ohio Gas Co.* v. *Federal Power Commission*, 115 F. 2d 385 (C. A. 6).

and require the company to comply with previous Commission orders and "to ascertain and submit its original cost" (R. 109-113, 114-119, 119-124). East Ohio moved to dismiss these complaints (R. 125-129). In its order of February 16, 1946, in which it reviewed the previous proceedings involving East Ohio,[3] the Commission denied the company's motions to dismiss (R. 129, 135); it ordered the complaints of the three cities consolidated with its original order of February 14, 1939, and set a date for hearing at which East Ohio was directed to show cause why it should not be held to be a "natural-gas company" and why it had not

[3] Following the 1942 amendment of Section 7 of the Act expanding the Commission's certificate jurisdiction (56 Stat. 83), East Ohio, on March 24, 1943, had applied for a certificate of public convenience and necessity for a proposed 112-mile pipe line connecting with the interstate pipe lines of Panhandle Eastern Pipe Line Company (Panhandle). In the alternative, it requested the Commission to find that it was not, and would not thereby become a "natural-gas company." The Commission, on November 30, 1943, found East Ohio to be a "natural-gas company" within the meaning of the Natural Gas Act and granted the requested certificate (R. 134, 148). 4 F. P. C. 15, 19. Without seeking review of the Commission's order, East Ohio accepted the certificate and has since been operating thereunder (R. 134, 148-149). See *infra*, pp. 8-9. East Ohio also applied for a "grandfather" certificate for its facilities in operation on February 7, 1942, the date of the 1942 amendment, or alternatively for a finding that it was not a "natural-gas company." The Commission, on January 18, 1944, in issuing the "grandfather" certificate, again found East Ohio to be a "natural-gas company" (R. 134, 149). 4 F. P. C. 497. Without seeking judicial review of this finding, East Ohio accepted the certificate (R. 149).

complied with the Commission's cost and accounting orders (R. 129-136). 5 F. P. C. 371. Following hearings held on March 19-20, 1946, the Commission, in an order dated June 25, 1946, made the following undisputed findings:

East Ohio, an Ohio corporation with its principal place of business at Cleveland, is and has been since some time prior to June 21, 1938, the date of the enactment of the Natural Gas Act, engaged in the business of producing, purchasing, transporting and distributing natural gas in Ohio by means of an extensive pipe-line system (R. 142). In addition to selling natural gas at retail to about 550,000 ultimate consumers in 69 communities in eastern Ohio, including Cleveland, Akron, Canton, Massillon and Youngstown (R. 89, 142), East Ohio owns and operates within the State of Ohio in the regular course of its business a number of large-diameter, high-pressure transmission lines which it uses to transport gas produced outside Ohio to its local distribution systems and which connect with the interstate transmission facilities of its affiliate, Hope Natural Gas Company (Hope), and of Panhandle. During 1945, East Ohio handled about 79 million Mcf of natural gas, 85% of which was purchased from out-of-state sources (62% from Hope and 23% from Panhandle); the remainder of the gas handled originated in Ohio and was produced or purchased by East Ohio (R. 147). None of this gas is sold for resale, but is sold locally

at rates fixed in accordance with the applicable Ohio law.

A. *Pipe Lines Connecting With Hope:* Four of East Ohio's transmission pipe lines, 18 and 20 inches in diameter, connect at the Ohio-West Virginia state line on the Ohio River with, and are direct continuations of, Hope's West Virginia transmission pipe lines from which East Ohio, until it began purchasing gas from Panhandle in 1944 (*infra*, pp. 8-9), procured 70% to 85% of its supply (R. 144). Three of the pipe lines run northwesterly to Cleveland, about 120 miles (R. 91, 98, 143). The fourth extends in a northwesterly direction to the company's Gross Farm valve station near Canton, at which point two pipe lines, each designated "Youngstown Branch line," one 16 inches and the other 14 inches in diameter, extend in a northeasterly direction toward Youngstown (R. 91, 143).

In accordance with the contracts between East Ohio and Hope, Hope delivers to East Ohio, at these points of connection at the Ohio-West Virginia state line, gas produced outside of Ohio [4] at sufficiently high pressures so that the greater portion of the gas is carried through East Ohio's transmission pipe lines without additional compression to most of its local distribution systems in Ohio,

[4] Formerly the gas so delivered was produced in West Virginia, but more recently it has consisted of gas, some of which is produced in West Virginia and the rest purchased by Hope from Tennessee Gas and Transmission Company which transports it from Texas (R. 144).

including those in and in the vicinity of Canton, Massillon, Akron and Cleveland (R. 144, 145). The remainder of the gas so delivered is carried to the Youngstown-Warren-Niles area, and is propelled by the pressure at which it is received from Hope plus additional pressure obtained by repumping at East Ohio's Gross Farm compressor station (R. 145). Hope's West Virginia compressor station, its transmission pipe lines from there to the Ohio-West Virginia state line, and East Ohio's pipe lines [5] are operated and controlled as a single unit or system respecting the pressures and volume of natural gas delivered by Hope (R. 145). By these operations, gas flows continuously and uninterruptedly from Hope's compressor station in West Virginia to East Ohio's points of distribution in Ohio (R. 145).

These transmission facilities of East Ohio are also used to carry natural gas produced in Ohio to points of local distribution in East Ohio's system (R. 144). The first Ohio-produced gas entering these lines is introduced at a point approximately 40 miles from the state line (R. 144).[6]

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[5] Also a part of East Ohio's transmission system for the transportation of this gas is T. P. L. No. 1, a 12-inch transmission pipe line, which commences at a place called McKee Farm in Summit County, Ohio, and which extends northerly to Cleveland (R. 91, 143).

[6] East Ohio also maintains connection with the transmission facilities of Peoples Natural Gas Company at the Ohio-Pennsylvania state line at a point near Peterburg, Ohio, where occasionally, at times of heavy demands, comparatively small quantities of gas are sold and delivered to East Ohio by Hope through the agency of Peoples (R. 145-146).

B. *Connection with Panhandle:* Since March 1944, East Ohio has owned and operated, in accordance with the certificate of public convenience and necessity issued it by the Commission (*supra,* p. 4, fn. 3), a 20-inch transmission pipe line, 112 miles long, which commences at a point near Maumee, Ohio, about 10 miles inside the western border of Ohio, and extends in a general easterly direction to the Cleveland-Akron area (R. 91, 95, 146). At the west end of this line, the pipe line connects with a 16-inch transmission pipe line of Panhandle, which connects at a point in Ohio near the Ohio-Michigan boundary with Panhandle's 22-inch transmission pipe line which in turn extends into Indiana and thence through several states to Texas, Oklahoma and Kansas (R. 146). The portion of Panhandle's 22-inch pipe line in Ohio is a direct continuation of the portion that lies within Indiana; Panhandle's 16-inch pipe line in Ohio extending therefrom and East Ohio's connecting line are direct extensions of Panhandle's 22-inch line (R. 146).

The gas (50,000 Mcf per day) which East Ohio purchases from Panhandle is produced in Texas, Oklahoma and Kansas and transported by Panhandle to the point of connection with East Ohio (R. 147). From that point, East Ohio takes delivery of this gas and carries it in bulk partly through a branch transmission pipe line to Cleveland, and the remainder on into East Ohio's main transmission system, south of Cleveland (R. 147). In accordance with the contract between Panhandle

and East Ohio, Panhandle maintains such high pressures in its 22-inch line at the point of connection with its 16-inch line that the gas is carried through East Ohio's transmission lines to the points of destination without additional compression, except that portion of the gas which is transmitted to the Youngstown-Warren-Niles area and to storage which receives additional pressure at East Ohio's Gross Farm valve station (R. 147). By these operations the natural gas flows continuously and uninterruptedly from the points of production in Texas, Oklahoma and Kansas to the points of local distribution and storage areas in Ohio (R. 147).

Based on these facts, the Commission found that these transmission pipe lines of East Ohio were not facilities used for local distribution but were facilities for the transportation of natural gas in interstate commerce (R. 148). It further found that East Ohio is "engaged in the transportation of natural gas in interstate commerce" and is a "natural-gas company" within the meaning of the Natural Gas Act (R. 148). Accordingly, it ordered East Ohio to comply with all previous Commission general accounting orders applicable to natural-gas companies and with all previous Commission orders requiring the filing of annual reports applicable to natural-gas companies (R. 150).

East Ohio, the State of Ohio, and the Public Utilities Commission of Ohio applied on July 24, 1946, for rehearing and stay (R. 151-163, 163-169),

which the Commission granted (R. 169-170). On rehearing, the Commission in a detailed opinion (R. 170-180)[7] reviewed East Ohio's facilities and operations and noted that it "failed, after careful deliberation, to find good cause to depart from [its] previous findings" (R. 179). It expressly rejected East Ohio's contention that its 650-mile pipe-line transportation system was a mere incident to local distribution (R. 174-176, 179). It further held that the finding that East Ohio is a natural-gas company "will, as we view it, in no manner interfere with the exercise by the State of Ohio of its authority to regulate the operations of the company in its business of local distribution" (R. 179-180). Accordingly, it dissolved its stay and directed that its order of June 25, 1946, be made effective (R. 180). The further applications of East Ohio, the State of Ohio, and the Public Utilities Commission of Ohio for rehearing (R. 180-188; 188-195) were denied by the Commission (R. 195-196).

On petition of review, the Court of Appeals, in ~~an opinion by Judge~~ Clark, reversed (R. 197-206).

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[7] As noted in the Commission's opinion, East Ohio had, concurrently with this proceeding, on January 18, 1946, applied for a certificate of public convenience and necessity for a 95-mile transmission pipe line, or in the alternative for a finding that it was not a "natural-gas company." (R. 170, fn. 1). The Commission on July 3, 1946, granted the requested certificate again based on a finding that East Ohio was a "natural-gas company." 5 F. P. C. 639. As in the other instances (*supra*, p. 4, fn. 3), East Ohio accepted this certificate and has operated thereunder, without seeking judicial review.

Judge Edgerton dissented in a separate opinion (R. 205-206).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia Circuit erred:

1. In holding that East Ohio is not a "natural-gas company" subject to the Commission's jurisdiction under the Natural Gas Act.

2. In holding that the definition of "interstate commerce" contained in Section 2(7) of the Act is not coextensive with its ordinary and well-established meaning.

3. In holding that East Ohio's transmission pipe lines are devoted solely to the local distribution of natural gas to local consumers within the provision of Section 1(b) exempting such facilities from Commission jurisdiction.

4. In holding that East Ohio is completely and validly regulated by the Ohio Commission.

5. In holding that the assertion of Commission jurisdiction over East Ohio would constitute "unnecessary, undesirable and unintended usurpation of state regulatory authority."

6. In failing to hold that the Commission's order directing East Ohio to comply with its general accounting orders and to file annual reports was reasonable and valid.

7. In reversing the order of the Commission.

REASONS FOR GRANTING THE WRIT

1. The Natural Gas Act applies "to the transportation of natural gas * * * in interstate com-

merce" (Section 1 (b), *infra*, p. 21), and "natural-gas company" is defined in the Act as a person engaged, *inter alia*, in "the transportation of natural gas in interstate commerce" (Section 2(6), *infra*, p. 21). Section 2(7) defines "interstate commerce" as meaning "commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."

At least since *The Daniel Ball*, 10 Wall. 557, it has been established that a person is engaged in interstate commerce when he transports a product on a portion of an interstate through journey even though only within a single state. E. g., *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 228-229. In applying this familiar rule, this Court has found that most of the very pipelines involved in this case —those between the West Virginia connections and the distribution systems—are in interstate commerce, and this decision is, of course, equally applicable to respondent's other lines. *East Ohio Gas Co.* v. *Tax Commission*, 283 U.S. 465.[8] And the

[8] The Court stated in the *East Ohio Gas Co.* v. *Tax Commission* case, 283 U.S. at 470:

> The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with its local system is essentially national—not local—in character and is interstate commerce within as well as without that State. The mere fact that the title or the custody of the gas passes while it is en route from State to State is not determi-

same principle has been applied in other cases in the same field. *Public Utilities Commission* v. *Attleboro Steam and Electric Co.*, 273 U.S. 83; *Peoples Natural Gas Co.* v. *Public Service Commission*, 270 U.S. 550, 554, and cases cited;[9] *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 688.

The court below has held that the definition of interstate commerce in the Natural Gas Act excludes transportation within a single state as part of an interstate journey—a contention not urged by any of the parties below. But the phrase "commerce between any point in a State and any point outside thereof" in the statutory definition clearly is as broad as "interstate commerce" itself as defined in the cited cases. Respondent is engaged in commerce between points in two states when it transports gas on the Ohio portion of a continuous

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native of the question where interstate commerce ends. * * *

[9] The *Peoples Gas* case is also directly in point, as appears from the following excerpt from the opinion (270 U.S. at 554):

> As respects the West Virginia gas we are of opinion, in view of its continuous transportation from the places of production in one State to those of consumption in the other and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point and show that the passing of custody and title at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business.

through movement from other states to an Ohio destination.

The basis for the ruling below, that the statutory definition of interstate commerce is narrower than the meaning which this Court's decisions had previously given to the concept of "interstate commerce", was explicitly rejected by this Court in *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682, 688, wherein the Court stated that:

> There is nothing in the terms of the Act or in its legislative history to indicate that Congress intended that a more restricted meaning be attributed to the phrase "in interstate commerce" than that which theretofore had been given to it in the opinions of this Court.

In the *Interstate* case, the transactions held to be interstate commerce consisted of sales by the respondent company, within the state in which the gas was produced, to other companies which would transport the gas across state lines. Obviously these activities occurring within the state of origin of the interstate movement are no more a part thereof than respondent's transportation of the gas within the state of destination.

Accordingly we think it clear that the holding below that respondent is not engaged in the transportation of gas in interstate commerce is in conflict not only with established principles but with decisions of this Court which are directly in point.[10]

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[10] The citation by the court below of its decision in *Border Pipe Line Co.* v. *Federal Power Commission,* 171 F. 2d 149,

2. The court below also held that respondent came within the exception for "local distribution of natural gas" in Section 1 (b) of the Act, inasmuch as, in its view of the facts, respondent "is engaged *solely* in the local distribution of natural gas to local consumers" (R. 202). But the undisputed facts plainly demonstrate that the high pressure lines from the West Virginia border and Maumee to the local distributing points are not a part of local distribution.[11] The reasoning of the court below that respondent was engaged

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as supporting its conclusion here, is, we submit. compounding error upon error. The court there held that a company which transported natural gas in Texas to a point on the Rio Grande River, where it sold the gas for further transportation and use in Mexico was not a "natural-gas company." This was based on the court's misconstruction of the statutory definition of interstate commerce—"commerce between any point in a State and any point outside thereof, * * * but only insofar as such commerce takes place within the United States"—as not embracing the domestic phase of the foreign commerce. Cf. *In re Reynosa Pipe Line Co.*, 5 F.P.C. 130, 136-137, affirmed *sub nom. Cia Mexicana de Gas* v. *F. P. C.*, 167 F. 2d 804 (C. A. 5); H. Rep. No. 1290 to accompany H.R. 5249, 77th Cong., 1st sess., pp. 3-4; *230 Boxes, More or Less, of Fish* v. *United States*, 168 F. 2d 361 (C.A. 6). Review of that decision by this Court was not sought for reasons other than an acceptance of its soundness.

[11] Recognition that local distribution, as distinguished from transportation, does not commence until after town-border regulating stations are reached, appears in a brief issued by a committee representing the Natural Gas Industry, and filed by Mr. William A. Dougherty, one of respondent's counsel below, with the House Committee on Interstate and Foreign Commerce, holding hearings on H. R. 5423, a predecessor bill to the Natural Gas Act (Hearings on H. R. 5423, 74th Cong., 1st sess., pp. 1786, 1790).

solely in local distribution because "*all* of its property * * * is devoted to that sole purpose" (R. 202) would seriously impair the operation of many provisions of the Natural Gas Act, since virtually all natural gas transportation has for its ultimate purpose either local distribution or sale to industrial consumers, both of which are exempt from the jurisdiction of the Federal Commission. The Commission's finding that these transmission pipe lines are not "facilities used for the * * * local distribution of natural gas" in interstate commerce (R. 14[illegible]) was thus clearly a reasonable and proper one, amply supported by the evidence, and should have been accepted by the court below. See Natural Gas Act, Section 19(b), Appendix, *infra*, p. 26; *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 145-146; *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 130-131.

3. Inasmuch as the transportation here involved clearly comes within the statutory definitions, it is immaterial whether or not Ohio has regulated the same transactions, as the decision below seems to imply (R. 199-200). *Connecticut Light & Power Co.* v. *F. P. C.*, 324 U.S. 515, 533; cf. *Northwestern Electric Co.* v. *F. P. C.*, 321 U.S. 119. It is to be observed, however, that the Natural Gas Act was enacted in large part because this Court had held that a state could not regulate the portions of an interstate through journey taking place within its borders.[12] *Public Utilities Commission* v. *Attleboro*

[12] The statement quoted in the opinion below from the testimony of Mr. DeVane (R. 205) does not support the court's conclusion, as appears from its text.

Steam and Electric Co., 273 U.S. 83; *Peoples Natural Gas Co.* v. *Public Service Commission*, 270 U.S. 550; *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U.S. 456; *Illinois Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498.

Indeed, the history of the Natural Gas Act contains several express references to the East Ohio Company and to this Court's decision in the *East Ohio Tax* case as typical of the situations which the proposed legislation was designed to reach.[13] Thus an unsuccessful attempt was made in connection with H. R. 5423, 74th Cong., 1st sess. (a predecessor bill), to exempt companies such as East Ohio from the proposed regulation. The proposal provided that "after delivery of said gas to a distributing company for distribution to local consumers * * * any transmission to such consumers shall be deemed to be intrastate commerce, or in local distribution not subject to the jurisdiction of the Commission." Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st sess., p. 1668. The proponent of the amendment stated that it was "drawn in the light of the decision of the United

[13] See Final Report of the Federal Trade Commission made pursuant to S. R. 83, 70th Cong., 1st sess., S. Doc. 92, 70th Cong., 1st sess., Part 84-A, pp. 558, 560; Hearings before Subcommittee of House Committee on Interstate and Foreign Commerce on H. R. 11662 (predecessor bill), 74th Cong., 2d sess., pp. 14, 16, 17; Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st sess., pp. 1668, 1695.

States Supreme Court in *East Ohio Gas Co.* v. *Tax Commission,* 283 U.S. 465, 470." *Id.* at p. 1695. This amendment was not adopted, nor does any provision similar thereto appear in the Act as enacted.

Finally, the fact that respondent's rates would not be subject to regulation by the Commission is not material, for, as a natural-gas company within the meaning of the statute, respondent is required to obtain a certificate of necessity from the Commission, and other features of its activities are subject to Commission control.[14]

4. In addition to the fact that the question of East Ohio's status under the Natural Gas Act is important to the 550,000 ultimate consumers in the 69 Ohio communities served by East Ohio, review of

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[14] Section 5(b) of the Act, Appendix, *infra,* p. 22, specifically authorizes the Commission to investigate and determine the cost of "* * * transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas." Section 7, Appendix, *infra,* pp. 22-24, as originally enacted and as amended in 1942, vested in the Commission control over abandonments of service and the construction and extension of facilities. Section 8, Appendix, *infra,* pp. 24-25, vesting jurisdiction over accounting in the Commission, was designed to eliminate inflationary write-ups as well as to assure uniform accounting practices. The reports of the Federal Trade Commission made pursuant to S. Res. 83, 70th Cong., 1st sess., which Section 1(a) of the Act stated disclosed the necessity for federal regulation, show that "inflation of assets," "stock watering" and "misrepresentation of financial condition" among some natural-gas companies were "specific evils" in the industry. See Sen. Doc. 92, 70th Cong., 1st sess., Part 84-A, pp. 615-616; *id.,* Part 83, pp. 567-568; see, also, Hearings before the House

this decision is important in the administration of the Natural Gas Act, since there are many companies in the natural-gas industry which are engaged in activities in interstate commerce wholly within a single state. The Commission has already held several of these companies to be "natural-gas companies" subject to its jurisdiction under the Act. See, *e.g.*, *Re El Paso Natural Gas Co., Southern California Gas Company and Southern Counties Gas Company of California*, 5 F.P.C. 115, 118, 120; *Re The River Gas Company*, 4 F.P.C. 10[illegible]; *Central Illinois Public Service Company* v. *Panhandle Eastern Pipe Line Company*, 4 F.P.C., 1043, affirmed *sub nom Kentucky Natural Gas Corp.* v. *F.P.C.*, 159 F. 2d 215 (C.A. 6); *Re Republic Light, Heat and Power Company, Inc.*, 4 F.P.C. 884; *Re Producers Gas Company*, 4 F.P.C. 418; *Re Empire Gas & Fuel Company, Ltd.*, 3 F.P.C. 1099. There are now pending before the Commission 43 similar cases which involve, as here, transportation in interstate commerce wholly within a single state. Since the Commission's orders in these cases will all be subject to review by the court below, the only court of appeals authorized under Section 19 (b)

Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st sess., pp. 115-116. In fact, the legislative history also shows that, in 1935, the investment accounts of East Ohio reflected write-ups amounting to $15,454,511.65. See "Report on an Examination of Accounts and Records of The East Ohio Gas Co." (Sen. Doc. 92, 70th Cong., 1st sess., Part 83, p. 1695, *et seq.*; see, also, testimony of the F. T. C. accounting examiner (*id.*, p. 630 *et seq.*).

of the Act to entertain petitions for review of all Commission orders reviewable thereunder, the result, if this decision is not reversed, will be to create substantial gaps in the complementary regulatory scheme provided by Congress in enacting the Act, and hinder the Commission in protecting the ultimate consumer from exploitation.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

BRADFORD ROSS,
General Counsel,
Federal Power Commission.

MAY 1949

APPENDIX

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended by 56 Stat. 83, 15 U. S. C. 717 *et seq.* are as follows:

> Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.
>
> (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.
>
> Sec. 2. When used in this Act, unless the context otherwise requires—
>
> * * * * *
>
> (6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.
>
> (7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the

same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

*　　*　　*　　*　　*

Sec. 5. * * *

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Sec. 6. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

Sec. 7(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or

artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extension thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale

of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

*   *   *   *   *

Sec. 8. (a) Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as nec-

essary or appropriate for purposes of the administration of this Act: *Provided, however,* That nothing in this Act shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-gas company may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by such natural-gas companies, and may classify such natural-gas companies and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays or receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

* * * * *

Sec. 10. (a) Every natural-gas company shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate to assist the Commission in the proper administration of this Act. The Commission may prescribe the manner and form in which such reports shall be made, and require from such natural-gas companies specific answers to all questions upon which the Commission may need information. The Commission may require that such reports shall include, among other things, full information as to assets and liabilities, capitalization, investment and reduction thereof, gross receipts, interest due and paid, depreciation, amortization, and other ~~reserves,~~ cost of facilities, cost of maintenance and operation of

facilities for the production, transportation, or sale of natural gas, cost of renewal and replacement of such facilities, transportation, delivery, use, and sale of natural gas. The Commission may require any such natural-gas company to make adequate provision for currently determining such costs and other facts. Such reports shall be made under oath unless the Commission otherwise specifies.

* * * * *

Sec. 19. (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

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No. 71

In the Supreme Court of the United States

October Term, 1949

Federal Power Commission, petitioner

v.

East Ohio Gas Company, et al.

On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief for the Federal Power Commission

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addition to selling natural gas at retail to about 550,000 ultimate consumers in 69 communities in eastern Ohio, including Cleveland, Akron, Canton, Massillon and Youngstown (R. 89, 142), East Ohio owns and operates within the State of Ohio in the regular course of its business a number of large-diameter, high-pressure transmission lines which it uses to transport gas produced outside Ohio to its local distribution systems and which connect with the interstate transmission facilities of its affiliate, Hope Natural Gas Company, and of Panhandle (R. 143–144, 146). During 1945, East Ohio handled about 79 million Mcf of natural gas, 85% of which was purchased from out-of-state sources (62% from Hope and 23% from Panhandle); the remainder of the gas handled originated in Ohio and was produced or purchased by East Ohio (R. 147). None of this gas is sold for resale, but is sold locally at rates fixed in accordance with the applicable Ohio law.

A. *Pipe Lines Connecting With Hope.*—Four of East Ohio's transmission pipe lines, 18 and 20 inches in diameter, connect at the Ohio-West Virginia state line on the Ohio River with, and are direct continuations of, Hope's West Virginia transmission pipe lines from which East Ohio, until it began purchasing gas from Panhandle in 1944 (*infra*, pp. 9–10), procured 70% to 85% of its supply (R. 144). Three of the pipe lines

run northwesterly to Cleveland, about 120 miles (R. 91, 98, 143). The fourth extends in a northwesterly direction to the company's Gross Farm valve station near Canton, at which point two pipe lines, each designated "Youngstown Branch line," one 16 inches and the other 14 inches in diameter, extend in a northeasterly direction toward Youngstown (R. 91, 143).

In accordance with the contracts between East Ohio and Hope, Hope delivers to East Ohio, at these points of connection at the Ohio-West Virginia State line, gas produced outside of Ohio [3] at about 290 pounds pressure so that the greater portion of the gas is carried through East Ohio's transmission pipe lines without additional compression to most of its local distribution systems in Ohio, including those in and in the vicinity of Canton, Massillon, Akron and Cleveland (R. 144, 145, 171).[4] The remainder of the gas so

[3] Formerly the gas so delivered was produced in West Virginia, but more recently it has consisted of gas, some of which is produced in West Virginia and the rest purchased by Hope from Tennessee Gas and Transmission Company which transports it from Texas (R. 144).

[4] The transmission pipe lines leading to Cleveland terminate at three town-border regulator and metering stations (R. 172, 45, 65). From these stations, a high-pressure distribution system encircles a portion of Cleveland and extends to points of connection in that city with the company's low-pressure distribution system (R. 65–66). By the time the gas reaches these stations, pressure in the transmission lines varies between 60 and 100 pounds (R. 65). The pressure in the high-pressure distribution systems varies between 30 and

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In the Supreme Court of the United States

October Term, 1949

No. 71

Federal Power Commission, petitioner
v.
East Ohio Gas Company, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the Federal Power Commission (R. 170–180) is reported at 74 PUR(NS) 256. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 197–206) is reported at 173 F. 2d 429.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on February 14, 1949 (R. 206). The petition for a writ of certiorari was filed on May 13, 1949, and was granted on June 20, 1949 (R.

210). 337 U. S. 937. The jurisdiction of this Court is invoked under Section 19 (b) of the Natural Gas Act and under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The East Ohio Gas Company owns and operates in the State of Ohio natural-gas transmission pipe lines which connect with the West Virginia transmission lines of Hope Natural Gas Company, an affiliate, at the Ohio-West Virginia State line and with the interstate pipe-line system of Panhandle Eastern Pipe Line Company at Maumee, Ohio. East Ohio purchases 85% of the natural gas handled by it from Hope and Panhandle, which transport it from sources outside Ohio to the points of connection with East Ohio's transmission pipe lines. East Ohio takes delivery of the gas at these points and transports it by means of its high-pressure transmission pipe lines to its local distribution systems in Ohio.

1. The basic question presented is whether, by virtue of its ownership and operation of these transmission pipe lines, East Ohio is a "natural-gas company," subject to the Federal Power Commission's jurisdiction under the Act. This question, in turn, involves the following subsidiary questions:

a. Whether these transmission pipe lines are used "in interstate commerce" within the meaning of Section 2 (7) of the Natural Gas Act.

b. Whether these transmission pipe lines are "facilities used for * * * [local] distribution" or "other transportation," exempt from Commission jurisdiction by Section 1 (b) of the Act.

2. A further question presented is whether, assuming East Ohio is a "natural-gas company," the Commission's directions that East Ohio comply with its general accounting orders, and file annual reports, are arbitrary, unreasonable and invalid under the Natural Gas Act and the Constitution.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act of 1938 (Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by Act of February 7, 1942, c. 49, 56 Stat. 83, 15 U. S. C. 717 *et seq.*) appear in the pamphlet copy of the Act submitted with this brief.

STATEMENT

Proceedings Leading up to Order of June 25, 1946.—On its own motion and on the complaint of the City of Cleveland, Ohio, the Federal Power Commission (Commission) on February 14, 1939, instituted an investigation into the cost of transporting natural gas by The East Ohio Gas Company from the Ohio River to the city gate of Cleveland and directed the company to file an inventory and a statement of the original cost of its property used and useful in such transporta-

tion (R. 100–103, 130). The Commission denied East Ohio's application for hearing, rehearing and stay of this order (R. 131)[1] (1 F. P. C. 586, 595) and on February 3, 1943, it ordered a hearing, on a date there fixed, to determine whether East Ohio was a "natural-gas company" (R. 134), which hearing, however, was later postponed until further order of the Commission (R. 134).

Meanwhile, three Ohio cities (Euclid, Cleveland and Lakewood), in 1942, filed complaints with the Commission praying that the Commission "redetermine" East Ohio to be a "natural-gas company" and require the company to comply with previous Commission orders and "to ascertain and submit its original cost" (R. 109–113, 114–119, 119–124). East Ohio moved to dismiss these complaints (R. 125–129). On February 16, 1946, the Commission issued an order which recited the previous proceedings involving East Ohio;[2] denied the company's motions to dismiss

[1] East Ohio's petition for review of this denial was dismissed by the Court of Appeals for the Sixth Circuit on the ground that the Commission's order was preliminary and not reviewable since the company had not been subjected to any definitive requirements (R. 132). *East Ohio Gas Co.* v. *Federal Power Commission*, 115 F. 2d 385 (C. A. 6).

[2] Following the 1942 amendment of Section 7 of the Act expanding the Commission's certificate jurisdiction (56 Stat. 83), East Ohio, on March 24, 1943, had applied for a certificate of public convenience and necessity for a proposed 112-mile pipe line connecting with the interstate pipe lines of Panhandle Eastern Pipe Line Company. In the alternative, it requested the Commission to find that it was not, and would

(R. 129, 135); ordered the complaints of the three cities consolidated with the investigation instituted by its original order of February 14, 1939; and set a date for hearing at which East Ohio was directed to show cause why it should not be held to be a "natural-gas company" and why it had not complied with the Commission's cost and accounting orders (R. 129–136). 5 F. P. C. 371. Following hearings held on March 19–20, 1946, the Commission, in an order dated June 25, 1946, made the following undisputed findings:

Order of June 25, 1946.—East Ohio, an Ohio corporation with its principal place of business at Cleveland, is and has been since some time prior to June 21, 1938, the date of the enactment of the Natural Gas Act, engaged in the business of producing, purchasing, transporting and distributing natural gas in Ohio by means of an extensive pipe-line system (R. 142). In

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not thereby become, a "natural-gas company." The Commission, on November 30, 1943, found East Ohio to be a "natural-gas company" within the meaning of the Natural Gas Act and granted the requested certificate (R. 134, 148). 4 F. P. C. 15, 19. Without seeking review of the Commission's order, East Ohio accepted the certificate and has since been operating thereunder (R. 134, 148–149). See *infra*, pp. 9–10. East Ohio also applied for a "grandfather" certificate for its facilities in operation on February 7, 1942, the date of the 1942 amendment, or alternatively for a finding that it was not a "natural-gas company." The Commission, on January 18, 1944, in issuing the "grandfather" certificate, again found East Ohio to be a "natural-gas company" (R. 134, 149). 4 F. P. C. 497. Without seeking judicial review of this finding, East Ohio accepted the certificate (R. 149).

delivered is carried to the Youngstown-Warren-Niles area, and is propelled by the pressure at which it is received from Hope plus additional pressure obtained by repumping at East Ohio's Gross Farm compressor station (R. 145). Hope's West Virginia compressor station, its transmission pipe lines from there to the Ohio-West Virginia State line, and East Ohio's pipe lines[5] are operated and controlled as a single unit or system respecting the pressures and volume of natural gas delivered by Hope (R. 145). By these operations, gas flows continuously and uninterruptedly from Hope's compressor station in West Virginia to East Ohio's points of local distribution in Ohio (R. 145).

These transmission facilities of East Ohio are also used to carry natural gas produced in Ohio to points of local distribution in East Ohio's system (R. 144). The first Ohio-produced gas entering these lines is introduced at a point ap-

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60 pounds; and in the low-pressure distribution systems, the pressure is from 4 to 6 ounces (R. 65–66).

There are similar high-pressure and low-pressure distribution systems at Akron and Youngstown (R. 47). Near all the other communities served by East Ohio, there are town-border regulator and metering stations from which local distribution lines emanate (R. 47).

[5] Also a part of East Ohio's transmission system for the transportation of this gas is T. P. L. No. 1, a 12-inch transmission pipe line, which commences at a place called McKee Farm in Summitt County, Ohio, and which extends northerly to Cleveland (R. 91, 143)

proximately 40 miles from the State line (R. 144).[a]

B. *Connection with Panhandle.*—Since March 1944, East Ohio has owned and operated, in accordance with the certificate of public convenience and necessity issued it by the Commission (*supra*, pp. 4–5, fn. 2), a 20-inch transmission pipe line, 112 miles long, which commences at a point near Maumee, Ohio, about 10 miles inside the western border of Ohio, where it connects with a 16-inch transmission pipe line of Panhandle, and extends in a general easterly direction to the Cleveland-Akron area (R. 91, 95, 146). Panhandle's 16-inch transmission pipe line connects at a point in Ohio near the Ohio-Michigan boundary with Panhandle's 22-inch transmission pipe line which in turn extends from Texas, Oklahoma and Kansas into Ohio and Michigan (R. 146). Panhandle's 16-inch pipe line in Ohio and East Ohio's connecting line are direct extensions from Panhandle's 22-inch line (R. 146). Only natural gas received from Panhandle is carried in this line of East Ohio (R. 147).

The gas (50,000 Mcf per day) which East Ohio purchases from Panhandle is produced in

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[a] East Ohio also maintains connection with the transmission facilities of Peoples Natural Gas Company at the Ohio-Pennsylvania State line at a point near Petersburg, Ohio, where occasionally, at times of heavy demands, comparatively small quantities of gas are sold and delivered to East Ohio by Hope through the agency of Peoples (R. 145–146).

Texas, Oklahoma and Kansas and transported by Panhandle ~~to~~ the point of connection with East Ohio (R. 147). From that point, East Ohio takes delivery of this gas and carries it in bulk to a point south of Cleveland, where part is carried through a branch transmission pipe line to that city, and the remainder on into East Ohio's main transmission system, south of Cleveland (R. 147). In accordance with the contract between Panhandle and East Ohio, Panhandle maintains such high pressures (about 320 pounds) in its 22-inch line at the point of connection with its 16-inch line that the gas is carried through East Ohio's transmission lines to the points of destination without additional compression, except that portion of the gas which is transmitted to the Youngstown-Warren-Niles area and to storage which receive additional pressure at East Ohio's Gross Farm valve station (R. 147, 171). By these operations the natural gas flows continuously and uninterruptedly from the points of production in Texas, Oklahoma and Kansas to the points of local distribution and storage areas in Ohio (R. 147).

Based on these facts, the Commission found in its order of June 25, 1946 that these transmission pipe lines of East Ohio were not facilities used for local distribution but were facilities for the transportation of natural gas in interstate commerce (R. 148). It further found that East Ohio is "engaged in the transportation of natural gas

in interstate commerce" and is a "natural-gas company" within the meaning of the Natural Gas Act (R. 148). Accordingly, it directed East Ohio to comply (1) with all previous accounting orders (Nos. 69, 69-A, 73 (set out at R. 71, 83, 74)), issued by the Commission and applicable to "natural-gas companies," including those orders relating to the determination of original cost of property, and (2) with all its previous orders (Nos. 63, 80, 86, 100, 113 (set out at R. 69, 80, 81, 85, 87)) requiring "natural-gas companies" to file annual financial and statistical reports on forms prescribed by the Commission (R. 150).[7]

Subsequent Proceedings.—East Ohio, the State of Ohio, and the Public Utilities Commission of Ohio applied on July 24, 1946, for rehearing and stay (R. 151-163, 163-169), which the Commission granted (R. 169-170). On rehearing, the Commission in a detailed opinion (R. 170-180)[8]

[7] The Commission on December 30, 1947 deleted from this order the requirement of Paragraph (A) as to the furnishing of certain information relating to the cost of transporting natural gas from the Ohio River to the City of Cleveland as required by its order of February 14, 1939, as supplemented. That requirement was deleted because the information required either duplicated other provisions of the order of June 25 or no longer would serve any useful purpose (R. 195, 196).

[8] As noted in the Commission's opinion, East Ohio had, concurrently with this proceeding, on January 18, 1946, applied for a certificate of public convenience and necessity for a 95-mile transmission pipe line, or in the alternative for a finding that it was not a "natural-gas company." (R. 170,

reviewed East Ohio's facilities and operations and noted that it "failed, after careful deliberation, to find good cause to depart from [its] previous findings" (R. 179). It expressly rejected East Ohio's contention that its 650-mile pipe-line transportation system was a mere incident to local distribution (R. 174–176, 179). It further held that the finding that East Ohio is a natural-gas company "will, as we view it, in no manner interfere with the exercise by the State of Ohio of its authority to regulate the operations of the company in its business of local distribution" (R. 179–180). Accordingly, it dissolved its stay and directed that its order of June 25, 1946, be made effective (R. 180). The further applications of East Ohio, the State of Ohio, and the Public Utilities Commission of Ohio for rehearing (R. 180–188; 188–195) were denied by the Commission (R. 195–196).

In its petition for review filed in the Court of Appeals for the District of Columbia Circuit as authorized by Section 19 (b) of the Act, East Ohio sought reversal of the Commission's order on the ground that the Commission had improperly found it to be a "natural-gas company" sub-

fn. 1.) The Commission on July 3, 1946, granted the requested certificate again based on a finding that East Ohio was a "natural-gas company." 5 F. P. C. 639. As in the other instances (*supra*, pp. 4–5, fn. 2), East Ohio accepted this certificate and has operated thereunder, without seeking judicial review.

ject to its jurisdiction under the Natural Gas Act (R. 6–7). It further claimed that even if it were a "natural-gas company," the orders with which it was directed to comply exceeded statutory and constitutional limitations as applied to it both because they required information in respect to facilities other than those relating to the transportation of natural gas in interstate commerce and because the cost of compliance was so great as to render the orders arbitrary (R. 7–8). The State of Ohio and the Public Utilities Commission of Ohio were permitted to intervene as petitioners. The Court of Appeals, in an opinion by Judge Clark, reversed (R. 197–206). It held that the Commission erred in finding that East Ohio was a "natural-gas company" under the Act. "We therefore," it stated, "reach no decision as to the reasonableness or constitutional validity of the orders" (R. 205). Judge Edgerton dissented in a separate opinion (R. 205–206).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia Circuit erred:

1. In holding that East Ohio is not a "natural-gas company" subject to the Commission's jurisdiction under the Natural Gas Act.

2. In holding that the definition of "interstate commerce" contained in Section 2 (7) of the Act is not coextensive with its ordinary and well-established meaning.

3. In holding that East Ohio's transmission pipe lines are devoted solely to the local distribution of natural gas to local consumers within the provision of Section 1 (b) exempting such facilities from Commission jurisdiction.

4. In holding that East Ohio is completely and validly regulated by the Ohio Commission.

5. In holding that the assertion of Commission jurisdiction over East Ohio would constitute "unnecessary, undesirable and unintended usurpation of state regulatory authority."

6. In failing to hold that the Commission's order directing East Ohio to comply with its general accounting orders and to file annual reports was reasonable and valid.

7. In reversing the order of the Commission.

SUMMARY OF ARGUMENT

I

A. In *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, this Court held that most of the very pipe lines here involved were used in interstate commerce of national concern. Contemporaneous cases indicated that the states were powerless to regulate such activities. Congress was aware of the *East Ohio* case, and the history of the Natural Gas Act shows that East Ohio was mentioned as the type of company which the statute was designed to reach.

B. (1) East Ohio is covered by the Act's definition of "natural-gas company," as "a person engaged in the transportation of natural gas in interstate commerce * * *." At least since *The Daniel Ball*, 10 Wall. 557, it has been firmly established that a person who transports a product on a portion of an interstate through journey, even though his portion of the transportation occurs entirely within a single state, is engaged in interstate commerce.

The holding below that East Ohio nevertheless is not engaged in "interstate commerce" within the Act's definition because its interstate activities take place in one state ignores the fact that the Act was passed to fill the gap in state regulation brought to light by the *Attleboro* and *East Ohio* cases which related to that precise situation. It also conflicts with this Court's holding in *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, that "interstate commerce" as used in the Natural Gas Act has the meaning customarily accorded that phrase by the courts.

Moreover, several provisions of the Act belie East Ohio's contention that, since it is engaged in transportation and not the sale for resale of natural gas in interstate commerce, no useful purpose would be served by federal regulation of it and that therefore authority for such regu-

lation does not exist. Section 1 (b) makes transportation of natural gas in interstate commerce, as distinct from its sale for resale, a basis for Commission jurisdiction. In addition, the language of Section 5 (b) authorizing the Commission to investigate and determine "the cost of * * * transportation of natural gas" buttressed by its legislative history leaves no doubt that Congress meant the Act to apply to precisely the class of situations here involved. The provisions of Section 7, particularly sub-section (a) empowering the Commission to require the extension of service, the establishment of physical connections and the wholesale sale of gas, reenforce this conclusion, for that Section also is designed exclusively to deal with the regulation of transportation as such and has no relation to the regulation of rates.

(2) East Ohio's transmission pipe lines are not exempted from Commission jurisdiction by Section 1 (b) as "facilities used for * * * [local] distribution," or as "other transportation". These lines, extending about 100 miles into Ohio before reaching the centers of distribution, are neither local nor distribution lines, and the transportation is "in interstate commerce", and therefore not affected by the phrase "other transportation". The legislative history shows that these exemptions were meant to cover local matters, and were not intended to subtract from Section

1 (b)'s affirmative grants of jurisdiction relating to interstate commerce of national concern.

There are several additional reasons why the court below improperly held these pipe lines to be local distribution facilities. To classify facilities in accordance with the ultimate purpose for which the gas is used, as the court below did, would largely defeat the effectiveness of the Act, since practically all facilities used in the industry have local distribution or sales to industrials, both of which are exempt, as their ultimate purpose. The functional classification of facilities whereby transportation and transmission is differentiated from distribution has been universally accepted in the industry, and indeed by East Ohio itself. Secondly, *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, and *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U. S. 61, hold that the Commission's jurisdiction embraces all companies engaged in specified activities in interstate commerce, even companies engaged predominantly, but not entirely, in local distribution. The *Connecticut* case, relied on by respondent, does not remotely suggest that long range high-pressure transmission lines are exempt. Finally, the Commission's finding that East Ohio's transmission pipe lines are not facilities used for local distribution is reasonable under the law and amply supported by the evidence, and thus is binding on the courts.

(3) The constitutional doubts suggested by East Ohio as arising if it is held to be a "natural-gas company" and thereby subjected to public utility obligations have already been put to rest by *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, where the same constitutional issue was raised and definitely disposed of.

II

A. The Commission's order requiring East Ohio (1) to comply with the Commission's general accounting orders prescribing a uniform system of accounts to be kept and observed by all "natural-gas companies" and requiring original cost determinations of natural-gas plant, and (2) to file annual financial and statistical reports on forms prescribed for all natural-gas companies are well within the Commission's statutory powers despite the fact that the information so required includes data relative to facilities used in local distribution exempt from Commission regulation by Section 1 (b). The language of Sections 6 (b), 10 (a), 16 and 8 (a), plainly authorizes the Commission's imposition of these requirements in regard to all of a "natural-gas company's" properties, including the properties exempted from Commission regulation. The legislative history shows that the plenary nature of the Commission's power in these matters was called to Congress' attention and given Congressional approval. In addition, this

Court has already construed the similar provisions of the Interstate Commerce Act and the Federal Power Act as bestowing such plenary power. "The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction. but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction." *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 211.

B. East Ohio's constitutional objections to these requirements are without substance. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, and *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U. S. 119, settle (1) that the Commission's orders do not go beyond the commerce power of Congress or infringe upon the reserved powers of the states, and (2) that they do not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. Nor is the cost of compliance so great as to involve a deprivation of property without due process of law. The "general estimate" of between $1,500,000 and $2,000,000 was unaccompanied by any details to lend it credibility and was greatly in excess of the actual costs incurred by companies with comparative properties. Such

costs are legitimate costs of compliance, justified by the need for effective regulation in the public interest.

ARGUMENT

I

EAST OHIO IS A "NATURAL-GAS COMPANY" SUBJECT TO THE JURISDICTION VESTED IN THE COMMISSION BY THE NATURAL GAS ACT

As we shall show, East Ohio is clearly engaged in interstate commerce, and in transportation subject to the Act, not merely local distribution. But we first wish to refer to facts which show that when the Act was enacted East Ohio in particular was intended to be covered by it.

A. CONGRESS INTENDED TO SUBJECT EAST OHIO TO REGULATION AS A "NATURAL-GAS COMPANY" UNDER THE NATURAL GAS ACT.

The court below has stated that East Ohio "is now and has been very thoroughly and completely regulated by the Ohio Commission" (R. 200). Accordingly, it has held, quoting from this Court's decisions, that since the plain intent of Congress in enacting the Act was to complement state regulation and to fill the gap where the states are powerless to regulate, "the Act was never intended to confer jurisdiction over such a company as East Ohio since that company was already completely and validly regulated by the Ohio Commission long prior to the passage of the Act" (R. 204). This holding below, we submit, fails to take into account the situation in regard to

East Ohio existing at the time of the enactment of the Natural Gas Act and which still exists. Congress was aware of this situation and shaped the Act to deal with it.

Congress passed the Natural Gas Act, as the Court has repeatedly noted,[9] with an awareness of this Court's decisions that while the states could regulate activities in interstate transmission of gas which were local in character, *i. e.,* direct sales to local consumers (*Pennsylvania Gas Co.* v. *Public Service Commission,* 252 U. S. 23), they were without power to regulate activities in interstate transmission of gas which were national in character. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.,* 273 U. S. 83; cf. *Missouri* v. *Kansas Gas Co.,* 265 U. S. 298. See H. Rep. No. 709, 75th Cong., 1st sess., pp. 1–2; S. Rep. No. 1162, 75th Cong., 1st sess., pp. 1–2.[10] Accordingly, it is clear, as the court below held, that the Act was intended to fill the regulatory gap. H. Rep. No. 709, 75th Cong., 1st sess., p. 3.

One of the cases in this field involved the East Ohio Company itself. *East Ohio Gas Co.* v. *Tax*

[9] *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission,* 332 U. S. 507, 514–521; *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682, 689–690; *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, 601–603; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 609–613; *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.,* 314 U. S. 498, 506–508.

[10] The Senate Committee on Interstate Commerce incorporated the House Report No. 709 verbatim in its report.

Commission, 283 U. S. 465. In that case, this Court, while sustaining the constitutionality of an Ohio statute imposing excise taxes for the privilege of doing intrastate business, held that most of the very pipe lines here involved (those connecting at the state boundaries with out-of-state pipe lines of Hope and Peoples) although located entirely within the State of Ohio, were used in interstate commerce which was national in character. This Court explicitly stated (283 U. S. at 470):

> The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with its local system *is essentially national—not local—in character and is interstate commerce within as well as without that State.* The mere fact that the title or the custody of the gas passes while it is en route from State to State is not determinative of the question where interstate commerce ends. *Public Utilities Comm.* v. *Landon,* 249 U. S. 239, 245. *Missouri* v. *Kansas Gas Co.,* 265 U. S. 298, 307–309. *Peoples Gas Co.* v. *Pub. Serv. Comm.,* 270 U. S. 550, 554. *Public Util. Comm.* v. *Attleboro Co.,* 273 U. S. 83, 89. * * * [Italics supplied.]

Thus, at the time of the passage of the Act, East Ohio's transportation of natural gas had been

held to involve interstate commerce of national concern. Such activities this Court had held in the *Attleboro* case to be beyond the power of the states to regulate. The court below was thus clearly in error in holding that the Ohio Public Service Commission "completely and validly regulated"[11] East Ohio; the Ohio Commission's regulation of East Ohio's transportation of natural gas in interstate commerce, to the extent that such regulation exists, is possible, not because the State of Ohio has constitutional power in the premises, but because East Ohio, for reasons best known to it, has acquiesced in the Ohio

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[11] In fact, the Ohio Commission does not regulate East Ohio completely. As pointed out in the Commission's opinion (R. 176–177):

> * * * the State of Ohio lacks power to confer upon its Commission authority to require a certificate of public convenience and necessity for a transmission line used solely for transporting out-of-state gas, as for example, East Ohio's 112-mile line connecting with Panhandle. Any prior doubt as to whether this be so, was resolved when Congress provided in Section 7 (c) of the Natural Gas Act for national control of this very matter (*Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 506, 510; cf., *Colorado-Wyoming Gas Company* v. *Federal Power Commission*, 324 U. S. 626, 629–631). Moreover, it appears from the record that the Ohio Commission does not require the filing of reclassification and original cost studies of gas plant. * * *

Also, where the gas involved comes from out of state, the Ohio Commission does not possess regulatory power of the nature of that provided for in Sections 7 (a), (b) of the Act. See, *infra*, pp. 47–48.

Commission's assertion and exercise of such jurisdiction.[12]

The Act's legislative history shows plainly that Congress was aware of the Court's holding in the *East Ohio* v. *Tax Commission* case and intended that the activities there held to be national in character should be regulated under the Act. This is clear from the fact that the *East Ohio* v. *Tax Commission* case was referred to a number of times in the course of considering possible natural-gas legislation as illustrating the gap in state regulation which the legislation was intended to fill. During the hearings on H. R. 11662,[13] a predecessor bill (Hearings before a

[12] The basic provision of the Ohio General Code, pursuant to which the Ohio Commission exercises jurisdiction, purports to cover all activities taking place within the State of Ohio without differentiating between those in intrastate commerce and those in interstate commerce. See Ohio General Code, Section 614-2. The State of Ohio and the Ohio Commission urged in the court below that East Ohio's activities were in intrastate commerce. See, *infra*, pp. 33-34.

[13] The legislative history is contained in three committee hearings on proposed natural-gas legislation preceding adoption of the Natural Gas Act. The first of these was in 1935, House Hearings on H. R. 5423 (74th Cong., 1st sess.); the second, in 1936, House Hearings on H. R. 11662 (74th Cong., 2d sess.); the third, in 1937, House Hearings on H. R. 4008 (75th Cong., 1st sess.). H. R. 4008 later became H. R. 6586, which was subsequently passed as the Natural Gas Act.

In the hearings on H. R. 4008, there are repeated references to the testimony in the hearings on H. R. 11662 (pp. 1, 23, 32, 39, 41, 81, 108), and to hearings on H. R. 5423 (pp. 61, 84). Likewise, in the hearings on H. R. 11662, similar references are made to testimony given in the hearings on H. R. 5423 (pp. 10, 25, 35, 46, 81, 112). It seems clear, there-

Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d sess.), Mr. Dozier A. DeVane, then the Commission's Solicitor, cited the *Tax Commission* case at several places in a brief supporting the constitutionality of the proposed legislation (Hearings, pp. 13, 14, 16, 17). And after stating the facts and this Court's holding in the *Tax Commission* case, Mr. DeVane stated (Hearings, p. 16):

> Thus, the power of Congress to regulate the interstate transportation and wholesale sale of natural gas has been fully recognized by the Supreme Court of the United States. This power is not in conflict with any authority resident in the States, but, on the contrary, augments that power. The States cannot control the wholesale rates extracted for natural gas thus transported, *nor may they regulate any other of the phases of the interstate transportation.* Moreover, the regulation of retail rates and matters incident to local distribution have been exclusively reserved by H. R. 11662 to the States.[14] [Italics supplied.]

fore, that the record of all these hearings was considered in the enactment of the Natural Gas Act. Moreover, the members of the House Committee, with few exceptions, were the same during the three-year period.

[14] The court below relied upon the following excerpt from Mr. DeVane's testimony:

> The whole purpose of this bill is to bring under Federal regulation the pipe lines and to leave to the State Commissions control over distributing companies and

The *Tax Commission* case was also cited by Mr. John E. Benton, General Solicitor for the National Association of Railroad and Utilities Commissioners, who paraphrased its holding: "This

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over their rates, *whether that gas moves in interstate commerce or not.* [Emphasis supplied by court.] (R. 205.)

But that testimony, when read in context, does not support the conclusion of the court. Section 1 (b) of the proposed legislation then being considered provided:

> The provisions of this Act shall apply to the transportation of natural gas in high-pressure mains in interstate commerce and to natural-gas companies engaged in such transportation, but shall not apply to the distribution of natural gas moving locally in low-pressure mains or to the facilities used for such distribution or to the production of natural gas: *Provided*, That nothing in this Act shall be construed to authorize the Commission to fix rates or charges for the sale of natural gas distributed locally in low-pressure mains or for the sale of natural gas for industrial use only.

The excerpt from Mr. DeVane's testimony related to that version of Section 1 (b) and occurred in the following colloquy (Hearing before Subcommittee of the House Committee on Interstate and Foreign Commerce, on H. R. 11662, 74th Congress, 2d sess., p. 24):

*   *   *   *   *

> Mr. DeVane (continuing). Section 1 (b) defines the jurisdiction over the industry.
>
> Mr. Lea. Mr. Merritt wanted to ask you a question.
>
> Mr. Merritt. I thought you were going to skip that. That is what I wanted to ask about.
>
> Mr. DeVane. No, sir. Section 1 (b) provides that the provisions of this act shall be applicable to the transportation of natural gas in high-pressure mains in interstate commerce and to natural-gas companies engaged in such transportation, but shall not apply to the distribution of natural gas in low-pressure mains or to the facil-

case established very clearly that a State has jurisdiction to regulate the business of distributing gas after it has been imported, and the pressure has been stepped down to permit of local distribution. It, however, leaves the State authorities still subject to the rule announced in the *Kansas* case, and followed in the other cases which I have cited" (Hearings, p. 88).

Moreover, in the course of earlier House hearings on H. R. 5423, 74th Cong., 1st sess., Mr. Benton, who there also had appeared as General Solicitor for the National Association of Railroad and Utilities Commissioners, recommended on behalf of his Association that the bill be amended by the addition of provisos at least one

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ities used for such distribution or to the production of natural gas.

Mr. MERRITT. Well, facilities for such distribution refer only to low-pressure distribution, does it?

Mr. DEVANE. It refers to distribution of natural gas to consumers.

The whole purpose of this bill is to bring under Federal regulation the pipe lines and to leave to the State commissions control over distributing companies and over their rates, whether that gas moves in interstate commerce or not.

* * * * *

The last paragraph when read in context is clearly concerned with the local distribution to local consumers. The phrase "whether that gas moves in interstate commerce or not" obviously refers to *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23), involving direct sales to ultimate consumers from pipe lines crossing state boundaries. See *supra*, p. 21.

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of which would seem to exclude companies such as East Ohio. Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st sess., p. 1668.[15] Somewhat similar provisos were suggested for inclusion in the proposed power legislation which was before Congress at the same time. *Id.* at page 1661. Mr. Benton's explanation, in contrast to the language of the proposed amendments, might well have led Congress to believe that his amendments were not at all inconsistent with the holding of the *East Ohio* case. In discussing one of the Power Act amendments, he described it as "not inconsistent with the *Ohio Gas Co.* case," but urged that it be enacted to make clear that the new statutes did not apply to "interstate com-

[15] "Section 301 * * * (b) * * *

"*Provided, however,* That a public-utility which purchases at wholesale natural gas transmitted into one State from another State or from a foreign country, which natural gas is used by the purchasing public utility solely in distribution and sale to local consumers in the State where delivered or in local distribution, shall not by reason of such ownership or operation be subject to the provisions of this Act."

"(c) * * *

"*Provided, however,* That after delivery of said gas to a distributing company for distribution to local consumers, or after the distributor or transmitter following such transmission, by storage of said gas or by reduction of the pressure thereof, or otherwise, ~~so deals~~ with the same as to mark the end of long-distance transmission and the disposition of said gas for use in distribution to local consumers, any transmission to such consumers shall be deemed to be intrastate commerce, or in local distribution not subject to the jurisdiction of the Commission."

merce of that local character which was referred to by the court in the *Pennsylvania Gas* case," such as a company "located in a city like Texarkana and its distribution lines may be on both sides of the State line" (*id.* at p. 1679). Mr. Benton then turned to the proposed natural gas legislation (see p. 28, fn. 15, *supra*), and stated that "these paragraphs[16] were drawn in the light of the decision of the United States Supreme Court in *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470, which I have referred to before." *Id.* at p. 1695. He quoted at length from this Court's opinion without additional explanation or any indication of disapproval. It is thus clear that the attention of Congress was called to the *East Ohio* case when the Natural Gas Act was under consideration, and that a proposal which might have had the effect of overturning that decision was not adopted.

In addition to the foregoing, it should be noted that the Federal Trade Commission reviewed East Ohio's activities in detail in its investigation conducted pursuant to Sen. Res. 83, 70th Cong., 1st sess. "Utility Corporation Reports," Sen. Doc. 92, 70th Cong., 1st sess., Part 83, pp. 630–641; 1695–1774; Part 84A, pp. 229, 363, 373, 476.[17]

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[16] The reference was to paragraphs (c) and (d) of Section 301; no explanation as to the purpose of the proposed change in paragraph (b) (see p. 28, fn. 15, *supra*) appears in his testimony.

[17] The reports of the Federal Trade Commission show that "inflation of assets," "stock watering" and "misrepresenta-

This investigation, as set out in Section 1 (a) of the Natural Gas Act, disclosed the necessity for the regulation provided by the Act. In its final report, the Trade Commission described East Ohio, along with five other companies, as "typical natural-gas transmission companies."[18] It also described East Ohio's pipe lines as "important transmission pipe lines upon which the continuity of adequate service to such large cities as Cleveland, Akron, Youngstown, and numerous other communities depend." Sen. Doc. 92, 70th Cong., 1st sess., Part 84A, pp. 558, 560–561.

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tion of financial condition" among some natural-gas companies were "specific evils" in the industry. See Sen. Doc. 92, 70th Cong., 1st sess., Part 84–A, pp. 615–616; *id.*, Part 83, pp. 567–568; see, also, Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st sess., pp. 115–116. It also shows that, in 1935, the investment accounts of East Ohio reflected write-ups amounting to $15,454,511.65. See "Report on an Examination of Accounts and Records of the East Ohio Gas Co." (Sen. Doc. 92, 70th Cong., 1st sess., Part 83, p. 1695, *et seq.*; see, also, testimony of the F. T. C. accounting examiner (*id.*, p. 630, *et seq*)).

[18] Three of these five companies (Hope (320 U. S. 591), Colorado Interstate (324 U. S. 581) and Interstate Natural Gas Co. (331 U. S. 682)) have already been dealt with by this Court as "natural-gas companies." The fourth, the Columbia Gas & Electric System, now known as the Columbia Gas System, includes the following companies which the Commission has held to be "natural-gas companies": Virginia Gas Transmission Corporation, 3 F. P. C. 940; Atlantic Seaboard Corporation, 3 F. P. C. 941; United Fuel Gas Company, 4 F. P. C. 534; Central Kentucky Natural Gas Company, 3 F. P. C. 1083; The Ohio Fuel Gas Company, 4 F. P. C. 1033; Eastern Pipe Line Company, 3 F. P. C. 919; Home Gas Company, 3 F. P. C. 895; Cumberland and Allegheny Gas Company, 4

These materials from the Act's legislative history plainly demonstrate that the Act, properly viewed in the light of the situation existing at the time of its enactment (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 516; *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 248; *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 964 (C. A. 2), certiorari denied, 319 U. S. 741), was intended to regulate East Ohio as a "natural-gas company," subject to the provisions of the Act. Congress, we submit, did not intend that the jurisdiction of the Federal Commission be determined by the resistance *vel non* to state regulation on the part of the company sought to be regulated. Cf. *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 691–692.

B. EAST OHIO IS A "NATURAL-GAS COMPANY" AS DEFINED IN THE NATURAL GAS ACT

The language of the Act makes it plain that East Ohio is a "natural-gas company" subject to the Commission's jurisdiction under the Act by virtue of its transportation of natural gas

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F. P. C. 472; The Manufacturers Light and Heat Company, 4 F. P. C. 821; Natural Gas Company of West Virginia, 4 F. P. C. 391. As to the remaining company, United Gas Public Service Company, its properties and those of its subsidiaries, except for certain Texas properties, were acquired by United Gas Pipe Line Company which the Commission has also determined to be a "natural-gas company." 3 F. P. C. 863. Judicial review of these determinations was not sought.

from the points at which it accepts delivery to the points at which it delivers the gas into its local distribution systems, in continuation of the out-of-state transportation by others. Section 2 (6) of the Act, defines "natural-gas company" as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." In so far as here relevant, "interstate commerce" is defined in Section 2 (7) as "commerce between any point in a State and any point outside thereof, * * *." As a "natural-gas company" engaged in the transportation of natural gas in interstate commerce, East Ohio is subject to the various provisions of the Act, as provided in Section 1 (b) of the Act, which states:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

The court below, however, has found that East Ohio does not fall within the definition of "natural-gas company." That is based on the

holding that the transportation performed by East Ohio, taking place, as it does, wholly within Ohio, is not in "interstate commerce" as defined in Section 2 (7) of the Natural Gas Act. The court below has construed the phrase "commerce between any point in a State and any point outside thereof" in that definition as importing the additional requirement that the transportation be carried on by a single company in more than one state. It has further held that these transportation facilities are within the exemption of Section 1 (b) for "local distribution of natural gas * * * [and] the facilities used for such distribution" (R. 202). These holdings are, we submit, plainly incorrect.

1. *East Ohio is engaged in the transportation of natural gas in interstate commerce as defined in the Act and, therefore, is a "natural-gas company" subject to the Act's provisions.*

(a) *Respondent's transportation is interstate commerce.*—Although the contrary was urged below by the State of Ohio and the Ohio Commission, it is now conceded by respondents that "an interstate movement of gas continues in East Ohio's lines from points of connection with the interstate pipe lines for at least some considerable distance" (Br. in Opp., p. 8). This concession is in line with this Court's decision in *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, discussed in detail, *supra*, pp. 21–22, where it

was held that most of the transportation here involved was in interstate commerce of national concern.[19]

The holding in the *East Ohio* v. *Tax Commission* case merely involved the application of familiar principles. At least since *The Daniel Ball,* 10 Wall. 557, it has been firmly established that a person who transports a product on a portion of an interstate-through journey, even though his portion of the transportation occurs entirely within a single state, is engaged in interstate commerce. "When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. * * * That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed, it is an integral step in the interstate movement. See *Stafford* v. *Wallace,* 258 U. S. 495." *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 228–229. See, also, *United States* v. *Capital Transit Co.,* 325 U. S. 357, 363; *Joseph* v. *Carter & Weekes Co.,* 330 U. S. 422; *Interstate Natural Gas Co.* v. *Fed-*

[19] The *Tax Commission* case and the principles there applied are equally applicable to East Ohio's 114-mile pipe line connecting with Panhandle's interstate transportation system. There accordingly is no doubt that this pipe line is also a facility for interstate commerce.

eral Power Commission, 331 U. S. 682, 688, and cases cited in footnote 10; cf. *Interstate Oil Pipe Line Co.* v. *Stone,* 337 U. S. 662.

These principles have been applied in the field of the interstate transmission of natural gas and electricity, with the result that, where the commerce involved was national rather that local in character, the states were held to be without regulatory power. *Public Utilities Commission* v. *Attleboro Steam and Electric Co.,* 273 U. S. 83; *Peoples Natural Gas Co.* v. *Public Service Commission,* 270 U. S. 550; cf. *Missouri* v. *Kansas Gas Co.,* 265 U. S. 298. In the *Peoples* case, the company's operations, taking place entirely in Pennsylvania, were closely analogous to those of East Ohio. In addition to the locally produced gas which it transported and sold, the company purchased West Virginia-produced gas which it received at the West Virginia-Pennsylvania boundary and transported in a continuous stream to the points of consumption in Pennsylvania. The issue before the Court in that case related to the validity, in the face of the Commerce Clause, of an order of the Pennsylvania Public Service Commission requiring the company to continue the furnishing of natural gas to another company for local resale. The Court sustained the order on the ground that the company used sufficient locally-produced gas to satisfy the order. In so ruling, the Court found it unnecessary to pass on

whether the order could be sustained if it applied to West Virginia gas, the transportation of which within Pennsylvania it held to be part of interstate commerce. The Court stated (p. 554):

> As respects the West Virginia gas we are of the opinion, in view of its continuous transportation from the place of production in one State to those of consumption in the other and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point and show that the passing of custody and title at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business.

The question thus left open in the *Peoples* case was answered in the *Attleboro* case. In the latter case, the company sold and delivered electricity generated in Rhode Island at the Rhode Island-Massachusetts state line to a purchaser who resold the electricity in Massachusetts. The Court there commented that the sale "is a transaction in interstate commerce, notwithstanding the fact that the current is delivered at the State line." (273 U. S. at 86). The Court goes on to quote from the *Kansas Gas Co.* case, that " 'the paramount interest is not local but national, admitting of and requiring uniformity of regulation,' which

'even though it be the uniformity of governmental non-action, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned.'" 273 U. S. at 89. The Court concluded:

> * * * Nor is it material that the general business of the Narragansett Company appears to be chiefly local, while in the *Kansas Gas Co.* case the Company was principally engaged in interstate business. The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character; and if the regulation places a direct burden upon its interstate business it is none the less beyond the power of the State because this may be the smaller part of its general business. * * *

These rulings that the states could not regulate the very type of commerce here involved, including the portion of an interstate journey occurring within a single state, as in the *Attleboro* case itself, was responsible for the passage of the Natural Gas Act providing for federal regulation of such commerce.

(b) *As used in the Natural Gas Act "interstate commerce" has its ordinary meaning.*—The holding below that the statutory definition of interstate commerce requires that a single company be engaged in such commerce in two different states

is not required by the language of the statute, and is inconsistent both with its history (as already described) and with this Court's subsequent decisions.

The court below seemingly relied on the phrase "commerce between any point in a State and any point outside thereof," found in Section 2 (7) of the Act.[20] But this definition clearly is as broad as "interstate commerce" itself as defined in the cases cited above. Respondent is engaged in commerce between points in two states when it transports gas on the Ohio portion of a continuous through movement from other states to an Ohio destination.

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[20] The citation by the court below of its decision in *Border Pipe Line Co.* v. *Federal Power Commission*, 171 F. 2d 149, as supporting its conclusion here, is, we submit, compounding error upon error. The court there held that a company which transported natural gas in Texas to a point on the Rio Grande River, where it sold the gas for further transportation and use in Mexico, was not a "natural-gas company." This was based on the court's misconstruction of the statutory definition of interstate commerce—"commerce between any point in a State and any point outside thereof, * * * but only insofar as such commerce takes place within the United States"—as not embracing the domestic phase of the foreign commerce. Cf. *In re Reynosa Pipe Line Co.*, 5 F. P. C. 136, 136–137, affirmed *sub nom. Cia Mexicana de Gas* v. *Federal Power Commission*, 167 F. 2d 804 (C. A. 5); H. Rep. No. 1290 to accompany H. R. 5249, 77th Cong., 1st sess., pp. 3–4; *230 Boxes, More or Less, of Fish* v. *United States*, 168 F. 2d 361 (C. A. 6). Review of the *Border Pipe Line* decision by this Court was not sought for reasons other than an acceptance of its soundness.

The holding to the contrary below is, as the dissenting Judge noted (R. 206), in conflict with this Court's recent decision in *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682. In the *Interstate* case, the transactions held to be interstate commerce consisted of sales by the respondent company, within the state in which the gas was produced, to other companies which would transport the gas across state lines. Obviously respondent's transportation of the gas within the state of destination is just as much a part of interstate commerce as Interstate's activities within the state of origin. With respect to each transaction, the company was acting only within a single state.

This Court not only held the above transactions in the *Interstate* case to be interstate commerce, but expressly held that the Natural Gas Act intended that phrase to have the meaning previously given it in the decisions of this Court. The Court stated (331 U. S. at 688):

> There is nothing in the terms of the Act or in its legislative history to indicate that Congress intended that a more restricted meaning be attributed to the phrase "in interstate commerce" than that which theretofore had been given to it in the opinions of this Court. * * * Clearly the sales in question were a part of commerce being carried on between points in

> Louisiana and points in other States. There is nothing in that language to suggest that Congress intended that sales consummated before the gas crosses a state line should not be regarded as being "in" such commerce.

This explicit ruling that the scope of the statutory definition of interstate commerce is the same as that judicially given the phrase was merely a formulation of what had, until that time, been implicitly accepted. In several prior cases, it was accepted, in some without express statement, that the statutory definition of interstate commerce accorded with its ordinary judicial meaning and embraced a company's activities in interstate commerce taking place entirely within one state. Thus, all of the operations of Hope, East Ohio's affiliate from which it purchases gas at the West Virginia-Ohio State Line, are located within West Virginia (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 594); that company had been conceded to be a "natural-gas company" within the meaning of the Act (Record in No. 34, Oct. Term, 1943, Vol. III, p. 19), and the court below asserted that the Commission's regulation of Hope was valid (R. 204). In *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U. S. 626, the company received natural gas in Colorado from out-of-state lines, transported and sold it for resale in Colorado; the operations were held in interstate commerce.

324 U. S. at 628–631. And in *Illinois Natural Gas Co.* v. *Central Illinois Public Service Company,* 314 U. S. 498, the activity held to be subject to the Natural Gas Act was the transportation of natural gas in Illinois in continuation of another's out-of-state transportation and its sale for resale in Illinois.[21] Cf. *Jersey Central Power & Light Co.* v. *Federal Power Commission,* 319 U. S. 61, 70–71;[22] see, also, *Kentucky Natural Gas Corp.* v. *Federal Power Commission,* 159 F. 2d 215 (C. A. 6); *Peoples Natural Gas Co.* v. *Federal Power Commission,* 127 F. 2d 153 (C. A.

[21] In the *Illinois Natural Gas Co.* case, the Court, citing *Re East Ohio Gas Co.*, 28 PUR (NS) 129 (1 FPC 586, *supra*, p. 4) and *Re Billings Gas Company*, 35 PUR (NS) 321 (2 FPC 288) stated: "The Federal Commission has ruled that it has jurisdiction under the Act over companies which, like appellant, sell at wholesale to local distributors gas moving interstate" (314 U. S. at 509). In the *East Ohio* case thus cited, the Commission held on the basis of the same pipe lines, except for the Panhandle connection, as are here involved, that East Ohio was engaged in the transportation of natural gas in interstate commerce and was a "natural-gas company" subject to the Commission's jurisdiction under the Act. In the *Billings* case, the Commission held since the company involved continued the transportation of natural gas from the Wyoming-Montana State boundary to points of resale within Montana, it was engaged in transportation in interstate commerce and accordingly was a "natural-gas company."

[22] The language of the Federal Power Act (49 Stat. 847, 16 U. S. C. 824, *et seq.*) involved in the *Jersey Central* case is substantially the same as the definition of interstate commerce in the Natural Gas Act. Section 201 (c) of the Power Act provides "* * * electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof."

D. C.); *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953 (C. A. 2), certiorari denied, 319 U. S. 741.

The gap in regulation which the Act was designed to fill was created not only by companies which were engaged in interstate commerce in more than one state but as we have shown, *supra*, pp. 34–37, by those whose activities in interstate commerce take place within a single state. If the Act is to fulfill its purposes, it must extend to such companies.[23]

(c) *The statutory provisions showing the manner in which the Act would apply to respondent.*—The fact that East Ohio's sole activity in interstate commerce is the transportation of natural gas and not sale for resale, with the result that the Commission has no jurisdiction over the rates at which the company sells its natural gas, does not indicate, contrary to respondent's contention, that no useful purpose would be served by federal

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[23] There are a number of companies engaged in interstate transportation solely within a single state. The Commission has already held several of these companies to be "natural-gas companies" subject to its jurisdiction under the Act. See, *e. g.*, *Re El Paso Natural Gas Co., Southern California Gas Company and Southern Counties Gas Company of California*, 5 F. P. C. 115, 118, 120; *Re The River Gas Company*, 4 F. P. C. 1098; *Central Illinois Public Service Company* v. *Panhandle Eastern Pipe Line Company*, 4 F. P. C. 1043, affirmed *sub nom.* *Kentucky Natural Gas Corp.* v. *F. P. C.*, 159 F. 2d 215 (C. A. 6); *Re Republic Light, Heat, and Power Company, Inc.*, 4 F. P. C. 884; *Re Producers Gas Company*, 4 F. P. C. 418; *Re Eastern Pipe Line Co.*, 3 F. P. C. 919.

regulation of East Ohio and that, therefore, authority for such regulation does not exist.

(i) The language of Section 1 (b) making the Act applicable both "to the transportation of natural gas in interstate commerce," and "to the sale in interstate commerce of natural gas for resale * * *" together with the language of Section 2 (6) defining "natural-gas company" in terms of transportation *or* sale for resale in interstate commerce, plainly demonstrates that it is not necessary for a company to sell natural gas for resale in interstate commerce before it will be subject to the Commission's jurisdiction under the Act. "Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural-gas companies engaged in such transportation or sale." *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission,* 332 U. S. 507, 516. Transportation alone is obviously sufficient to subject a company to the Act.

(ii) Section 5 (b) likewise clearly demonstrates the Commission's jurisdiction over companies such as East Ohio, whose activities in interstate commerce involve transportation of natural gas but not sales thereof for resale. That section

authorizes the Commission to investigate and to determine "the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas." This provision precisely reaches East Ohio's operations.

That this was the congressional intent appears from the section's history. During hearings on H. R. 11662, Mr. DeVane, the Commission's Solicitor, testified (Hearings before Subcommittee of the House Committee on Interstate and Foreign Commerce, on H. R. 11662, 74th Cong., 2d sess., p. 30):

> There are some of these companies that supply the gas locally and do not sell it at the city gates. The gas that is furnished by them to the local communities is taken from interstate pipe lines, and the purpose of this subsection is to enable the Commission to determine for the State commission what would be a reasonable gate rate for that gas so that the local commission may be in a position to fix a reasonable consumer's rate in the locality. That is the only purpose of Section 5 (b).

Mr. John E. Benton, General Solicitor, National Association of Railroad and Utilities Commissioners, also testified regarding the need for federal assistance in such circumstances (Hearings, p. 89).

The House Committee, in reporting favorably H. R. 6586, 75th Cong., 1st sess., commented in regard to the proposed Section 5 (b) (House Report No. 709, 75th Cong., 1st sess., p. 5):

> Subsection (b) authorizes the Commission upon its own motion, or upon the request of a State commission, to investigate and determine the cost of production or transportation of natural gas in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. This subsection applies only to cases involving transportation of natural gas in interstate commerce and will greatly aid State commissions in their rate-making proceedings.

The bill as reported by the House Committee did not expressly limit such investigations to production or transportation in interstate commerce, although such was the general understanding. See Hearings on H. R. 4008, *supra*, pp. 107–110. And it was to make this understanding explicit that Section 5 (b) was amended on the floor of the House of Representatives to insert "by a natural-gas company" in the Section as enacted. 81 Cong. Rec. 6728.[24]

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[24] Mr. Boren, a member of the House Committee on Interstate and Foreign Commerce, in explaining the amendment, stated:

> * * * Mr. Chairman, my amendment has been agreed to by the committee. I offer the amendment in order to keep the jurisdiction of the Federal Government as

There can be no doubt that Congress, in Section 5 (b), dealt with the class of situations represented by that here involved, *i. e.*, companies whose interstate activities involved transporta-

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clearly defined as possible from the jurisdiction of the State government in cases arising under the provisions of this bill.

During the hearings I offered this amendment and made the following statement:

"Mr. Chairman, I would like to make this observation for the record and as a challenge to the proponents of this bill: That subsection B of section 5 provides for a growth and for the extension of the influence of a Federal bureau, or commission, in a realm wherein this proposal submits on its own acknowledgment that the Federal authority and responsibility does not rightfully exist."

Mr. Chairman, this amendment clarifies the jurisdiction as between the Federal and State governments, and assures us that the Federal Government will not go into a realm where the State government already has proper authority to handle the problem.

The committee has approved the amendment, and I have nothing further to say.

Mr. JONES. Mr. Chairman, will the gentleman yield?

Mr. BOREN. Yes.

Mr. JONES. Would the gentleman's amendment prevent the Commission from making an investigation such as the gentleman from Maryland referred to a while ago, with reference to costs of production and the conditions in the various local fields?

Mr. BOREN. I may say to the gentleman from Texas that this amendment would not prevent the Commission from making such investigations. According to the definition of a natural-gas company, this amendment would simply guarantee that the commission would not step out of the realm of interstate commerce, but would make such investigations only where companies engaged in interstate commerce were concerned. (81 Cong. Rec. 6728.)

tion, not sales for resale, and intended that these companies should be "natural-gas companies" subject to the Act.

(iii) The provisions of Subsections (a) and (b) of Section 7, dealing with extension of facilities and abandonment of service, are designed exclusively for the regulation of transportation in interstate commerce, and have no relationship to the regulation of rates.[25] Section 7 (a) authorizes the Commission to direct extension or improvement of transportation facilities, establishment of physical connections and the sale of natural gas. Thus, under Section 7 (a), the Commission may, under proper circumstances, require that facilities be extended or service be provided from an interstate gas transmission line to a community which is without any or adequate service. The Commission may also require a "natural-gas company" to sell gas at wholesale to a local distributing company. The legislative history discloses that there was a need for such authority and that the states had no power in the premises. See Final Report of the Federal Trade Commission (Sen. Doc. 92, 70th Cong., 1st sess., Part 84A), pp. 609, 611, 615, 617; also Hearings on H. R. 11662, *supra*, p. 155; Hearings on H. R.

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[25] East Ohio's claim that the provisions of Section 7 are without significance here since they apply only to "natural-gas companies" is without merit. That argument obviously assumes the very point in issue, inasmuch as a person becomes a "natural-gas company" under Section 2 (6) by engaging in either transportation of natural gas in interstate commerce or in its sale for resale in interstate commerce.

4008, *supra*, pp. 47, 66, 67, 68. Similarly, Section 7 (b) prohibits abandonment of facilities or service without Commission approval.

Likewise, in both its original and amended form,[26] Section 7 (c) requires certificates of public convenience and necessity for construction or extension of facilities.[27] In fact, as already shown,

[26] In its original form, Section 7 (c) required certificates of public convenience and necessity before a "natural-gas company" might undertake construction or extension of facilities for the transportation of natural gas to a market in which natural gas was being served by another "natural-gas company," or to acquire or operate any such facilities, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market (52 Stat. 825).

As amended on February 7, 1942, Section 7 (c) now provides that:

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extension thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission * * *.

[27] The testimony at the Hearings showed that construction of interstate facilities was free from state control and that federal regulation of such activity was needed in the public interest (Hearings on H. R. 4008, *supra*, pp. 69–70, 118). See also "State Regulation of Gas and Electric Utilities Delayed or Defeated by Plea of Interstate Commerce," Appendix L–1 to Summary Report of Federal Trade Commission (Sen. Doc. 92, Part 73A, 70th Cong., 1st sess.), pp. 79, 80, and decision there cited in footnote 4, par. 22.

supra, pp. 4–5, fn. 2, pp. 11–12, fn. 8, East Ohio has recognized the Act's regulation of transportation as distinct from sales for resale when it applied for and received from the Federal Power Commission certificates of public convenience and necessity required by the amended provisions of Section 7 (c). The Commission has continuing jurisdiction over the operation of these and East Ohio's other interstate facilities and any extension or enlargement thereof. At the end of 1945, East Ohio had an investment of $23,563,526.04, or 27.7% of its total gas property (interstate and intrastate) amounting to $85,066,881.01, classified in its accounts as "transmission" property; so classified were 903 miles of transmission lines, including the 650 miles involved here (R. 28, 55).[28]

The foregoing, we submit, demonstrates that East Ohio, being engaged in transportation of natural gas in interstate commerce within the meaning of Section 2 (7) of the Act, is a "natural-gas company" as defined in Section 2 (6) and is subjected to the Commission's jurisdiction under the Act by virtue of the grant of

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[28] Section 8, vesting jurisdiction over accounting in the Commission, was designed to eliminate inflationary write-ups as well as to assure uniform accounting practices. Effective regulation of the interstate activities of a natural-gas company requires uniform accounting for the protection of consumers, investors, and the public generally. Sections 9 and 10, relating to rates of depreciation and periodic and special reports, also deal with matters calling for federal administration independently of the rate regulation aspect.

jurisdiction in Section 1 (b) over "the transportation of natural gas in interstate commerce, * * * and * * * natural-gas companies engaged in such transportation * * *."

2. *East Ohio's transmission pipe lines are not within the exemptions from Commission jurisdiction contained in Section 1 (b)*

The court below has adopted respondents' contention that East Ohio's transmission pipe lines are merely incidental to, and actually a part of, its local distribution systems and hence exempt from Commission jurisdiction as "local distribution of natural gas [and] * * * facilities used for such distribution"; as the court below read the facts, they "clearly demonstrate, that [East Ohio] is engaged *solely* in the local distribution of natural gas to local consumers. *All* of its property, including the 650 miles of high-pressure lines, is devoted to that sole purpose" (italics in original) (R. 202). Respondents have advanced the further contention which, actually, is merely another formulation of its "local distribution" contention, that East Ohio's transportation through these pipe lines is "other transportation" also exempted by Section 1 (b). The argument is that, in Section 1 (a), Congress manifested an intent to regulate only the business of transportation of natural gas and hence, since East Ohio's natural-gas transportation is in connection with its local dis-

tribution systems, it is not transportation business but "other transportation." Both formulations of this contention, we submit, are without merit.

(a) In the first place as a matter of language, East Ohio's high-pressure lines do not come within any of the statutory exemptions. The transmission from the West Virginia state line and the Panhandle connection for over 100 miles to the vicinity of the Ohio cities where the gas is eventually reduced in pressure and distributed, is neither "local", nor "distribution". The statement in Section 1 (b) that the Act "shall not apply to any *other transportation*" follows the provision that the Act "shall apply to the transportation of natural gas in interstate commerce". The phrase "other transportation" obviously relates only to transportation not covered by the preceding clauses. Inasmuch as East Ohio is engaged in "the transportation of natural gas in interstate commerce", the "other transportation" exception has no significance in this case.

Respondent's contention that its operations come within the exempting clauses of Section 1 (b) is also refuted by all other indicia of legislative intention. Since this Court has held in *East Ohio* v. *Tax Commission* that these pipe lines are used in interstate commerce of national, rather than local concern, they not only fall, as

we have already shown, *supra*, pp. 33–50, within Section 1 (b)'s affirmative grant of jurisdiction, but are also not within the scope of the section's exemptions. The Act's legislative history, discussed *supra*, pp. 20–31, shows that the jurisdiction vested in the Commission by Section 1 (b) was intended to encompass activities in interstate commerce of national concern, with the exemptions there provided restricted to matters of local concern which are within the competence of the states to regulate. Under the *East Ohio* v. *Tax Commission* case read in conjunction with the *Attleboro* case the Ohio Commission was without power constitutionally to regulate these activities of East Ohio.

Moreover, the exemptions were not intended to subtract from the affirmative grant of jurisdiction to the Commission. This is plainly shown by the legislative history of the Act. On this matter the House Committee stated (H. Rep. 709, 75th Cong., 1st sess., pp. 3–4):

> In view of the importance of section 1 (b), which states the scope of the act, it seems advisable to comment on certain provisions appearing therein. It will be noted that this subsection of the bill, after affirmatively stating the matters to which the act is to apply, contains a provision specifying what the act is not to apply to, as follows:
>
> "but shall not apply to any other transportation or sale of natural gas or to the

local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill. That part of the negative declaration stating that the act shall not apply to "the local distribution of natural gas" is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character.

Accordingly, just as the "other sales" exemption of Section 1 (b) pertains to sales other than the "sales for resale in interstate commerce" which are included within the affirmative grant of jurisdiction, i. e., direct sales to industrials (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 516–517) and sales to ultimate consumers for domestic use, whether or not in interstate commerce, so the

"other transportation" exemption relates, we submit, to transportation other than that in interstate commerce, and could include, for example, transportation in intrastate commerce.

(b) There are additional reasons why these pipe lines are not covered by the "local distribution" exemption. In the first place, the holding below that they are exempt as property devoted to "local distribution" was based on a classification of facilities in accordance with the ultimate purpose to which the gas involved is to be put rather than according to their function. But "The natural gas industry in general performs the public service of producing and delivering natural gas to consumers. While the physical property and operations of the business may be divided into producing, transporting and distributing departments, they are all necessary parts of a complete system by which gas is produced and brought to the premises of the consumers." See Hearings on H. R. 5423, 74th Cong., 1st sess., p. 1803 (brief issued by a committee representing the Natural Gas Industry, and filed by Mr. William A. Dougherty, one of East Ohio's counsel, with the House Committee on Interstate and Foreign Commerce, holding hearings on H. R. 5423, a predecessor bill to the Natural Gas Act). Thus, practically all facilities used in the natural-gas industry have as their ultimate purpose either local distribution of gas or sale to industrial con-

sumers, both of which are exempt from the Commission's jurisdiction. The effect of classifying facilities according to ultimate purpose would be seriously to impair the operation of many of the Act's provisions, if not the Act itself.

On the other hand, classification of facilities according to function has been accepted as standard in the industry. See, *e. g.*, Sen. Doc. 92, 70th Cong., 1st sess., Part 84A, pp. 55, 111 *et seq.*, 356 *et seq.*; 584 *et seq.;* 591; 592. Indeed, the committee representing the Natural Gas Industry expressly recognized that local distribution, as distinguished from transportation, does not commence until after town-border regulating stations are reached. See Hearings on H. R. 5423, *supra*, pp. 1786, 1790. In this connection, it should be noted that East Ohio classifies the pipe lines here involved as "transmission lines" (R. 14, 27) and keeps its accounts according to the functions of production, transmission, distribution and storage (R. 27, 55, 68). Likewise, it classifies 27.7% of its property as "transmission" property (R. 28, 55), and a separate department of its business organization "has charge of its transmission lines" (R. 96). Mr. J. French Robinson, East Ohio's president and principal witness in the hearing before the Commission, was, accordingly, merely using accepted terminology when he variously referred to the pipe lines here involved as "transportation fa-

cilities" and "transmission lines" (*e. g.,* R. 45, 55–56, 65; see also, R. 88 (East Ohio's Exhibit 3)).[29]

In the second place, this Court's statement in *Connecticut Light & Power Co.* v. *Federal Power Commission,* 324 U. S. 515, 521, in regard to the company there involved, "that the predominant characteristic of the company's over-all operation is that of a local and intrastate service" does not, as respondents urge (Br. in Opp., p. 6), support the conclusion below. The facts of the *Connecticut* case differ materially from those at bar. The Connecticut company was not operating long-range transmission lines in interstate commerce similar to East Ohio's pipe lines from its connections with Hope and Panhandle. This Court noted that Connecticut "owns no lines crossing the Connecticut boundary and *does not connect with any other company at the boundary.*" (324 U. S. at 521, italics supplied.) In the *Connecticut* case this Court denied that it had held as a matter of law that "the process of reducing it [gas] from high to low pressure is not also part of such local business" (*id.,* at 534). The conclusion that the process of reducing energy or gas pressure in subdividing it to serve ultimate consumers could be a part of "local distribution"

[29] A map introduced by respondent depicts certain areas colored in yellow at and in the vicinity of the various cities and towns (Exhibit 4, R. 17, 91), and according to the testimony introduced by East Ohio, these areas are its "distribution areas" (R. 17).

does not remotely imply that the transportation of gas for over 100 miles before any reduction in pressure begins is a part of local distribution.

The principal holding in the *Connecticut* case was predicated on the assumption that *all* of the company's operations might be in local distribution. The Court rejected the company's contention that it would be exempt if only an insignificant proportion of its electric energy was transmitted interstate, saying (*id.*, at 536): "We do not find that Congress has conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate energy involved, and we do not think it would be appropriate to supply such a jurisdictional limitation by construction." In the instant case, the transmission pipe lines are clearly in interstate commerce and not themselves a part of local distribution, as we have shown (*supra*, pp. 33–50); and a substantial percentage (27.7) of East Ohio's property is classified as "transmission property" (R. 28, 55). Moreover, in *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U. S. 61, the Court sustained the Commission's assertion of jurisdiction over a company engaged primarily in local distribution in New Jersey; its sole activity in interstate commerce was the sale to another company in New Jersey of electricity which, by virtue of the latter company's arrangements with a New York company, occasionally

"slopped over" into New York. See, also, *Northwestern Electric Co.* v. *Federal Power Commission,* 321 U. S. 119; *Public Utilities Commission* v. *Attleboro Steam & Electric Co.,* 273 U. S. 83, 90.

Finally, the finding of the court below is directly contrary to the Commission's explicit finding that "East Ohio's 650 miles of transmission pipelines * * * are not 'facilities used for' local distribution, and that East Ohio's transportation of out-of-state natural gas in such lines is neither 'other transportation' nor 'local distribution' within the meaning of Section 1 (b)." (R. 175, 148.) This finding of the Commission was, as we have shown, a reasonable and proper one, amply supported by the evidence, and hence should have been accepted by the court below. See Section 19 (b) of the Natural Gas Act; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145–146; *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U. S. 111, 130–131.

(c) The *Pipe Line Cases,* 234 U. S. 548, relied on by respondent, do not support its contention that East Ohio's transportation is not "the business" of transportation (Section 1 (a))[30] because

[30] The language of Section 1 (a) is phrased not as a positive enactment, but rather as a general declaration of policy, with East Ohio's interpretation giving undue weight to the preamble. *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 965 (C. A. 2), certiorari denied, 319 U. S. 741.

conducted in connection with exempt local activities. Those cases involved an amendment to the Interstate Commerce Act making it applicable "to any corporation or any person or persons engaged in the transportation of oil * * * by means of pipe lines * * *" (34 Stat. 584). With reference to the case involving the Uncle Sam Oil Company, this Court said (p. 562):

> When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling with the description of the act, the transportation being merely an incident to use at the end.

Since East Ohio's transportation is not for its own use but rather for ultimate distribution to the public, its situation is clearly distinguishable. In contrast, a parallel to East Ohio's operation was presented in *Champlin Refining Company* v. *United States*, 329 U. S. 29, where this Court, expressly refusing to expand "the actual holding of" the *Pipe Line* cases (329 U. S. at 33), held that the Champlin Company, which used its pipe line "to convey [its] own refinery products to its terminal stations" (p. 32) was engaged in the "transportation of oil or other commodity" by pipe line within the meaning of Section 1 (1) (b) of the Interstate Commerce Act (49 U. S. C. 1 (1) (b)). In so holding, the Court distinguished

between Champlin's operations and those of th
Uncle Sam Oil Company (329 U. S. at 34):

> While Champlin technically is transport
> ing its own oil, manufacturing processe
> have been completed; the oil is not bein
> moved for Champlin's own use. Thes
> interstate facilities are operated to pu
> its finished products in the market in inte
> state commerce at the greatest economi
> advantage.

Inasmuch as this is the distinction between Ea
Ohio's operations and those of the Uncle Sa
Oil Company, the *Champlin* case, rather tha
the *Pipe Line* cases, if either, would be appl
cable here. And the *Jersey Central* and *Conne
ticut Light and Power* cases, discussed *supra*, p
56-58, are also inconsistent with the argume
that the nature of the major portions of the con
pany's operations warrants disregard of the r
mainder as merely incidental.

*3. Holding East Ohio to be a "natural-gas company" rai
no constitutional questions.*

East Ohio has asserted that it has never vo
untarily assumed any interstate public utili
obligations. Hence, it claims, that if it be he
a "natural-gas company" the Act would be give
an unconstitutional construction since the Co
mission would then be empowered to requi
it to discharge such obligations; for examp
the Commission could then order it to establi
physical connection of transportation faciliti

and sell natural gas to others, in accordance with the provisions of Section 7 (a) of the Act.

In effect, this argument questions the constitutionality of the Act as it applies generally, for, if sound, it would apply to any company engaged in the transportation or sale for resale of natural gas in interstate commerce on the date of the law's enactment. On the day prior thereto, none of these companies had assumed any interstate public utility obligations; they were not then public utilities, nor were they subject to regulation. Section 1 (a) of the Act, declaring the transpoitation and sale for resale of natural gas in interstate commerce to be "affected with a public interest," and the regulation of these activities "necessary in the public interest,"–together with the other provisions of the Act, imposed the public utility obligations provided in the Act on all companies, including East Ohio, which were engaged in these activities.

Federal Power Commission v. *Natural Gas Pipeline Co.,* 315 U. S. 575, puts at rest any question as to the constitutionality of the Act's imposition of public utility obligations on companies so engaged. In that case arguments basically the sam as those here advanced by East Ohio were expressly rejected; this Court there held (315 U. S. at 582–583):

> * * * The sale of natural gas originating in one State and its transportation and

delivery to distributors in any other State constitutes interstate commerce, which is subject to regulation by Congress. * * * It is no objection to the exercise of the power of Congress that it is attended by the same incidents which attend the exercise of the police power of a State. The authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the States under the Fourteenth to regulate the prices of commodities in intrastate commerce. * * *

The price of gas distributed through pipelines for public consumption has been too long and consistently recognized as a proper subject of regulation under the Fourteenth Amendment to admit of doubts concerning the propriety of like regulations under the Fifth. * * * And the fact that the distribution here involved is by wholesale rather than retail sales presents no differences of significance to the protection of the public interest which is the object of price regulation. * * * The business of cross-petitioners is not any the less subject to regulation now because the Government has not seen fit to regulate it in the past. * * *

See, also, *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 120 F. 2d 625, 629–631 (C. A. 7); Hearings before the Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 11662, 74th Cong., 2d sess.,

p. 23; cf. *Champlin Refining Co.* v. *United States*, 329 U. S. 29, 34–35.

II

THE COMMISSION'S GENERAL ORDERS WITH WHICH EAST OHIO WAS DIRECTED TO COMPLY DO NOT EXCEED STATUTORY OR CONSTITUTIONAL LIMITATIONS

The Commission's order of June 25, 1946, as amended, directed East Ohio (1) to comply with the Commission's general orders, prescribing a uniform system of accounts to be kept and observed by all natural-gas companies (Order No. 69 (set out at R. 71–73); Order No. 69–A (set out at R. 83–85)), and requiring a determination of original cost of gas plant (Order No. 73 (set out at R. 74–80)), and (2) to file for the years since and including 1939 annual financial and statistical reports on the forms prescribed by the Commission for all natural-gas companies (Orders Nos. 63, 80, 86, 100, 113 (set out at R. 69, 80, 81, 85, 87 respectively)) (R. 140, 150).[31] These orders were not special orders directed solely to East Ohio, but were general Commission orders directed to all "natural-gas companies," subject to the Commission's jurisdiction under the Act.

East Ohio contended below that, even if it were a "natural-gas company," the requirements of

[31] The Commission on December 30, 1947, amended the June 25 order to delete the requirement that East Ohio furnish special information as to the cost of transporting natural gas from the Ohio River to the City of Cleveland (R. 195–196). See *supra*, p. 11, fn. 7.

these orders, as applied to it, violated the limits of the Natural Gas Act and the Constitution. The court below found it unnecessary, in view of its holding that East Ohio was not a "natural-gas company," to consider these further contentions. Since, as we have demonstrated, the Commission properly held East Ohio to be a "natural-gas company," disposition of these further contentions is necessary to terminate this litigation. For this reason, resolution of these additional issues by this Court in this proceeding is desirable, particularly since, as we show, *infra,* they are frivolous.

A. THE ORDERS ARE WITHIN THE COMMISSION'S STATUTORY POWERS

East Ohio's argument that the Commission's general accounting and annual report orders exceed statutory limitations as applied to it, is predicated on the fact that these orders do not restrict the accounts and information so required to its facilities in interstate commerce, but embrace all its properties, including its facilities used for local distribution, exempted from Commission regulation by Section 1 (b). There is, we submit, no merit to this contention, for the provisions of the Natural Gas Act, pursuant to which these requirements were imposed, plainly were not intended to confine the Commission's jurisdiction in these matters solely to facilities used in

connection with a company's activities in interstate commerce.

1. Section 6 (b) authorizes the Commission to require "*every natural-gas company* * * * [to] file with the Commission an inventory of *all or any part of its property and a statement of the original cost thereof*, and [to] keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction." (Italics supplied.) Section 10 (a) required "*every natural-gas company* * * * [to] file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate to assist the Commission in the proper administration of this Act." (Italics supplied.) Section 16 authorizes the Commission to issue orders, rules and regulations "necessary or appropriate to carry out the provisions of this Act." And Section 8 (a) provides: "Every *natural-gas company* shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act: *Provided, however,* That nothing in this Act shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-

gas company may be required to keep by or under the authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by *such natural-gas companies,* and may classify such natural-gas companies and prescribe a system of accounts for each class." (Italics supplied.)

Thus, these provisions authorize the Commission to impose the obligations on all "natural-gas companies" and make no distinctions among these companies, based, as East Ohio would read these provisions, on the extent of the company's activities in interstate commerce. Moreover, they vest discretion in the Commission to prescribe such requirements "as necessary or appropriate for purposes of the administration of this Act." Among the purposes of the Act is the regulation of companies engaged in transportation of natural gas in interstate commerce as well as such transportation itself. See Section 1 (b); *Panhandle Eastern Pipe Line Co. v. Public Service Commission,* 332 U. S. 507, 516. In addition, the proviso in Section 8 (a) plainly manifests a congressional recognition that the power, affirmatively vested in the Commission by that section over a "natural-gas company's" accounts, includes not only its interstate faci ties, beyond the power of the states to regulate, but also its local facilties, which the states may regulate. Cf. *Hartford Electric Light Co. v. Federal Power Commission,* 131 F. 2d 953, 964 (C. A. 2), certiorari denied, 319 U. S. 741.

2. That these provisions were not intended to be limited in application to the interstate facilities of "natural-gas companies" is clear from their legislative history. As to the scope of Section 6 (b), Mr. Milo R. Maltbie, Chairman of the Public Service Commission of New York, testifying before the House Committee on Interstate and Foreign Commerce during hearings on H. R. 4008 (75th Cong., 1st sess.), pointed out that Section 7(b) of the Act was confined to "facilities subject to the jurisdiction of the Commission," and said (pp. 110–111):

> But, in sections 6 (a), 6 (b), and 7 (a), there is no such limitation, and unless that is read in by inference, which is stretching it a good deal, unless that limitation were read into those sections, there is in those sections a conference of authority on the Federal Power Commission over intrastate business and intrastate facilities.

Mr. Maltbie later commented in regard to Section 6 (b) that (p. 147):

> The act as it now reads covers all property whether used in interstate commerce or in intrastate commerce.

Upon request of the Committee, Mr. Maltbie submitted a number of proposed amendments, including one which would have added after the words "all or any part of its property" in Section 6 (b), the words "used and useful in whole or in part in interstate commerce." (Hearings,

p. 147). No such limitation was added to Section 6 (b).

The legislative history of Section 8 also belies any intention to limit the scope of the Commission's accounting power. In the hearings on H. R. 4008, the following colloquy as to the scope of 8 (a) occurred (Hearings, pp. 115–116):

> Mr. COLE [Member of House Committee]. Going back for a moment, do I understand you oppose the accounting provisions applying to the companies which are engaged partly in interstate and partly in intrastate business?
>
> Mr. MALTBIE [Chairman, Public Service Commission of New York]. Do I oppose them?
>
> Mr. COLE. Yes. You do not want section 8 (a) to apply to any company which has, say, a minor part of its business in interstate commerce?
>
> Mr. MALTBIE. I do not think it is necessary to go that far, Mr. Cole, because so far we have been able to get together, the States with the Federal Communications Commission, and substantially with the Federal Power Commission on a system of accounts, a common system of accounts. Now, if that can be done that will avoid the constitutional question or any other question that might be raised.
>
> Mr. COLE. Does not the operation of this section ultimately lead to the very laudable objective; that is, uniformity of ac-

counting, rates of depreciation, and so forth, for these companies engaged in interstate activities? Your State commission rulings might be a model for the Federal Power Commission to follow. Other States would not. The holding-company bill, the Federal Power Act, and others which at this minute I do not recall provide for substantially the same thing, to bring about some uniform accounting system.

Mr. MALTBIE. I think you may rely for the time being on endeavors to get uniformity so far as an accounting system is concerned.

What I was objecting to particularly was where it comes to a specific case. You are going to determine that a specific item shall go into this account or into that account. There you are going further than you need to for uniformity.

Mr. COLE. Well, that would impose upon the company two items, but would not interfere with what the State commission would require a company to do?

Mr. MALTBIE. Let us see——

Mr. COLE. Well, that is specifically exempted in this provision. What the Federal Power does under section 8 (a) shall not relieve any company from keeping such accounts as the State commission requires.

Moreover, Section 8 was derived from Section 301 of the Federal Power Act. The Senate Com-

mittee on Interstate Commerce in its report to accompany S. 2796, 74th Cong., 1st sess., which became the Federal Power Act, emphasized that accounting requirements extended to the "entire business" of the company, saying (S. Rep. No. 621, 74th Cong., 1st sess., p. 53):

> Section 301 requires every licensee and every public utility subject to the act to keep its accounts in the manner prescribed by the Commission; it thus takes a long step in the direction of the uniform accounting which is so essential in the electric industry. *The authority of the Commission over the accounts of companies under its jurisdiction extends to the entire business of such companies*, but there is an express provision that nothing in the act shall relieve any company from keeping such accounts as it is required to keep by a State commission or by any requirement of State law. [Italics supplied.]

Significant, also, in this connection is the statement made during debate on the floor of the House by Representative Cole, a member of the House Committee in charge of the bill (79 Cong. Rec. 10384):

> A uniform system of accounting is established, and because of the demand therefor and the admission on the part of most everyone that such is advisable, the provisions therefor will very likely be re-

quired of companies now subject to State regulation because of a small fraction of their business being under the Federal Commission.

3. This Court has often construed Section 20 of the Interstate Commerce Act (49 U. S. C. 20), vesting similar power in the Commerce Commission as to accounts and annual reports, not to be restricted to the specific activities subject to Commission regulation. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 211; *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423, 445, 449; *Norfolk & Western Ry. Co.* v. *United States*, 287 U. S. 134, 138–141; see, also, *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232, 237. "The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction." *Interstate Commerce Commission* v. *Goodrich Transit Co.*, *supra* at 211.

Moreover, this Court has read Sections 208 and 301 (a) of the Federal Power Act, which are the equivalents to Sections 6 and 8 (a) respectively

of the Natural Gas Act,[32] as plenary and not limited to the company's facilities in interstate commerce. *Jersey Central Co.* v. *Federal Power Commission*, 319 U. S. 61; *Northwestern Electric Co.* . *Federal Power Commission*, 321 U. S. 119; see, also, *Alabama Power Co.* v. *Federal Power Commission*, 128 F. 2d 280, 285–286 (C. A. D. C.),

[32] Sections 6 and 8 (a) of the Natural Gas Act are substantially the same as the Power Act's Sections 208 and 301 (a). Section 208 provides:

> (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.
>
> (b) Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction. 49 Stat. 853, 16 U. S. C. 824g.

Section 301 provides:

> (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however*, That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. * * * *Id.* 854, 16 U. S. C. 825.

certiorari denied, 317 U. S. 652; *Louisville Gas & Electric Co.* v. *Federal Power Commission,* 129 F. 2d 126, 133–134 (C. A. 6), certiorari denied, 318 U. S. 761; *Northern States Power Co.* v. *Federal Power Commission,* 118 F. 2d 141, 144 (C. A. 7); *Pennsylvania Power & Light Co.* v. *Federal Power Commission,* 139 F. 2d 445 (C. A. 3), certiorari denied, 321 U. S. 798. In the *Jersey Central* case, this Court held, notwithstanding the language of 201 (a) of the Power Act, that "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States," that Sections 203 (a) and 204 (a) of the Power Act vested general power in the Commission over the issue of all securities or assumption of all obligations by a public utility subject to the Act. In so holding, the Court stated "This conclusion finds strong support in the fact that not only § 203 (a), here under discussion, but §§ 204 (a), 208 and 301 (a) regulate matters obviously subject to state regulation" (319 U. S. at 75). The Court continued (at pp. 76–77):

> The legislative history points to this result. When S. 2796, containing the progenitor of the disputed section, was reported by the Committee on Interstate Commerce of the Senate, § 201 (a) concluded:
>
> "It is further declared to be the policy of Congress to extend Federal regulation

Natural Gas Act.[34] The Natural Gas Act does not contain the phrase appearing in Section 201 (a) of the Power Act to the effect that "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States," which was the basis of the companies' contentions in the *Jersey Central* and *Northwestern* cases. Furthermore, the Natural Gas Act in addition to vesting jurisdiction over the transportation and sale for resale of natural gas in interstate commerce, grants the Commission jurisdiction generally over "natural-gas companies engaged in such transportation or sale." The Power Act contains no such provision.

It is immaterial that the Ohio Commission also exercises certain accounting authority over East Ohio's operations. The Commission in its opinion has already indicated that its finding that East Ohio is a "natural-gas company" will not interfere with the exercise of the jurisdiction of the State of Ohio over it. Nor is supersedure of the State of Ohio's authority suggested anywhere. In any case, the Natural Gas Act recognizes the possibility of dual regulation at least in accounting matters. See Section 8 (a), partic-

[34] As in the case of the Power Act, the reports of the Federal Trade Commission show that "inflation of assets" and stock watering among some natural-gas companies were "specific evils" in the industry. They also show that in 1935, the investment accounts of East Ohio reflected write-ups amounting to over $15,000,000. See *supra*, p. 30, fn. 17; cf. R. 177.

to those matters which cannot be regulated by the States, and also to exert Federal authority to strengthen and assist the States in the exercise of their regulatory powers and not to impair or diminish the powers of any State commission."

The same bill had §§ 208 (a) and 301 (a), just referred to, which did regulate matters which could be regulated by the states. After its passage through the Senate in this form, the bill went to the House and 201 (a) was there amended by the Committee on Interstate and Foreign Commerce (H. Rep. No. 1318, 74th Cong., 1st Sess., June 24, 1935) to conclude, as it now does, "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." The report, although it commented on the section, did not mention this change as one of substance from the conclusion of the Senate bill. H. Rep. No. 1318, 74th Cong., 1st Sess., p. 26. Sections 208 and 301, with their regulation of matters subject to state regulation, remained unchanged. * * *[33]

[33] It is to be noted that the legislative history of the Act shows a general purpose to meet the need for a nationwide uniform accounting system (S. Rep. No. 621, 74th Cong., 1st Sess., pp. 17–18, 53; H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 7–8, 30–31; 79 Cong. Rec. 10574–10575; and House Hearings on H. R. 5423, 74th Cong., 1st Sess., pp. 2170–2171) disclosed by the Federal Trade Commission's report of its investigation of the public utility industry (House Hearings on H. R. 5423, 74th Cong., 1st Sess., pp. 178–179).

A like view of the Commission's plenary accounting authority was expressed in the *Northwestern Electric* case. In that case, the Commission, exercising its accounting power under Section 301 (a) of the Power Act, had required Northwestern, which, although it was a public utility under the Act, operated local electric and steam-heating facilities in Oregon and Washington, to amortize a $3,500,000 "write-up" by annual charges to its earned surplus. Although the company there contended, as East Ohio does here, that this requirement exceeded the powers conferred upon the Commission by dealing with local matters (see Brief for Petitioners in No. 195, October Term, 1943, pp. 15–16, 25 *et seq.*), this Court sustained the Commission's order, with the comment (321 U. S. at 122–123):

> The Commission's power to prescribe a uniform system of accounting and to require Northwestern to keep accounts accordingly is not open to doubt. Its action was fully justified by the Act, the relevant provisions of which are within the legislative power. The only inquiries now open are whether the order as to the disposition of the $3,500,000 item appearing in Account 107 goes beyond the Commission's statutory mandate or constitutional limitations. We hold that it does neither.

It follows, *a fortiori*, we submit, that the Commission has similar plenary power under the

ularly the proviso therein. As this Court stated in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 533, in regard to Commission jurisdiction under the similar Power Act provisions:

> * * * once a company is properly found to be a "public utility" under the Act the fact that a local commission may also have regulatory power does not preclude exercise of the Commission's functions.[35]

B. THE ORDERS DO NOT VIOLATE ANY PROVISION OF THE CONSTITUTION

1. East Ohio's claim that, so far as the orders here apply to it, they are "useful, if at all, only in the local regulation of intrastate commerce," and hence that they go beyond the commerce power of Congress and infringe upon the reserve power of the states, is inconsistent with *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 214, and *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U. S. 119, which squarely rejected the very contention here advanced by East Ohio. In the *Northwestern Electric Co.* case, where it sustained the far more drastic order there involved as not going "beyond * * * constitutional limitations" (321 U. S. at 123), the Court stated (321 U. S. at 125):

[35] Cf. *Arkansas Power & Light Co.* v. *Federal Power Commission*, 156 F. 2d 821 (C. A. D. C.), reversed *per curiam*, 330 U. S. 802.

The Commission's order does not violate the reserved rights of the states under the Tenth Amendment. We are not here concerned with what the regulatory authorities of Oregon or Washington may or may not demand or permit. Whatever that action may be, it is subordinate to Congress' appropriate exercise of the commerce power. The Commission's order does not purport presently to affect or constrain action by the states within their fields.

2. This Court's explanation in *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, as to the function of uniform systems of accounts and the desirability that they be kept open to inspection, *i. e.*, in order that the regulatory body "be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction" (224 U. S. at 211) is a complete answer to the contention that the Commission's orders violate the Fourth Amendment's prohibition against unreasonable searches and seizures. See also, *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U. S. 119.

3. East Ohio's further contention that these orders involve a deprivation of property without due process of law in violation of the Fifth Amendment rests in part upon its assumption that the cost of compliance with the Commission's

orders would be between $1,500,000 and $2,000,000 and in part on its unsupported conclusion that the costs of compliance with the orders would be unreasonable. This claimed cost was the "general estimate" of East Ohio's president, unaccompanied by any details which would lend it credibility (R. 25). The Commission found that "the unsupported estimate of cost of reclassification and original cost studies is not convincing, for our experience with other companies with greater property investment indicates that this estimate is considerably exaggerated" (R. 179).[36]

Nor are the costs of compliance unreasonable. In *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232, where the cost of compliance with the Federal Communications Commission's uniform system of accounts was estimated for one of the companies to be in excess

[36] East Ohio's plant account, as of December 31, 1945, was $85,066,881.01 (R. 55). In *Re Cities Service Gas Co.,* 3 F. P. C. 459, the company's plant account appeared on the books as $86,134,828 (*id.*, p. 465); the company claimed that its reclassification and original cost studies cost $850,000 (*id.*, p. 482); the staff claimed that these studies could have been prepared and completed at a cost of not more than $592,000 (*id.*, p. 483). In *Re City of Cleveland* v. *Hope Natural Gas Co.*, 3 F. P. C. 150, where the plant account claimed by the company was $69,735,638 (*id.*, p. 159), the company claimed that it had spent $675,000 for its reclassification and original cost studies (*id.*, p. 178). These studies, however, included a detailed property report by units (*id.*, p. 158), which the Commission had not required.

of $4,000,000 for the first year and over $1,000,000 per year thereafter (Record in No. 74, October Term, 1936, pp. 332–333), this Court stated "the evidence does not show that the expense of revising the accounts will lay so heavy a burden upon the companies as to overpass the bounds of reason." 299 U. S. at 247. The substantially lower costs here involved likewise do not "overpass the bounds of reason" particularly since, as the Commission found (R. 179):

> * * * effective regulation in the public interest provided for by Congress, the objective of the orders, is justification for legitimate cost of compliance. * * *
>
> * * * protection of the public interest requires uniform accounting by natural-gas companies, as was contemplated by Congress in the Natural Gas Act. To provide effective regulation of such companies, we must have information available from a uniform system of accounts. Otherwise, such regulation cannot be maintained on a national basis.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be reversed and the Commission's order, directing East Ohio to comply as a "natural-gas company" with its general accounting orders applicable to all "natural-gas companies" and to file

annual reports on forms prescribed by the Commission for all "natural-gas companies," be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

PAUL A. SWEENEY,
MELVIN RICHTER,
Attorneys.

BRADFORD ROSS,
General Counsel,

WILLIAM S. TARVER,
Assistant General Counsel,

BERNARD A. FOSTER, JR.,
HOWELL PURDUE,
Attorneys,
Federal Power Commission.

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In the Supreme Court of the United States

OCTOBER TERM, ~~1948~~ 1949

No. ~~520~~. 71

FEDERAL POWER COMMISSION,
Petitioner,

v.

THE EAST OHIO GAS COMPANY,
STATE OF OHIO,
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

BRIEF ON BEHALF OF RESPONDENTS OPPOSING THE GRANTING OF A WRIT OF CERTIORARI.

HERBERT S. DUFFY,
Attorney General of Ohio,
Attorney for Respondents the State of Ohio and the Public Utilities Commission of Ohio,

WILLIAM B. COCKLEY,
WALTER J. MILDE,
WM. A. DOUGHERTY,
STURGIS WARNER,
Attorneys for Respondent The East Ohio Gas Company.

KENNETH B. JOHNSTON,
Assistant Attorney General of Ohio,

C. W. COOPER,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5647

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OPINIONS BELOW.

The opinion of the Federal Power Commission (R. 170-180) is reported at 74 PUR (NS) 256. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 197-206) is reported at 173 F.2d 429.

STATEMENT.

Petitioner, hereafter called FPC, in its statement has attempted to convey the impression that East Ohio is engaged in two businesses in Ohio, the selling of natural gas at retail and "in addition" the operation of large diameter, high pressure transmission lines for the transportation of out-of-state gas (FPC Brief, p. 5). Its statement accordingly should be supplemented as follows:

East Ohio is an Ohio corporation all of whose property is in Ohio (R. 13). For half a century it has been engaged in the direct local distribution of natural gas. It has attached to its lines more than 550,000 consumers in 69

municipalities of which the principal are Cleveland, Akron, Canton, Massillon and Youngstown (R. 16, 89). In each it has a local franchise and sells direct to domestic, commercial and industrial consumers under rates either fixed by municipal ordinance or fixed or approved by The Public Utilities Commission of Ohio. It has no other business (R. 25).

It sells no gas to distributing companies for resale (R. 16).

It transports no gas for other persons for hire or otherwise (R. 23).

It sells no gas to industrial consumers except through its local distribution lines (R. 16).

Admittedly, it has no rates and no service subject to FPC jurisdiction even if it were held to be a "natural-gas company."

More than three-fourths of its supply is out-of-state gas supplied by interstate pipe lines. The balance comes from its Ohio fields. Over half of its supply comes from the Hope Natural Gas Company and is delivered to East Ohio on the northern bank of the Ohio River. About one-fourth comes from Panhandle Eastern Pipe Line Company and is delivered to East Ohio at Maumee, Ohio, south of Toledo (R. 89). Both Hope and Panhandle Eastern are interstate pipe line companies whose rates to East Ohio have been fixed by the FPC (R. 22).

Like all large distributing companies East Ohio owns and operates the high pressure lines that connect its city plants to the points of delivery by the interstate pipe line companies. It happens that East Ohio's lines to accomplish this are longer than those of many distributing companies but no different in their purpose or operation.

Ever since the adoption of the first Public Utility Act in Ohio in 1911 East Ohio has been subject to regulation by the Ohio Commission. Every service that it renders is subject to regulation by Ohio. Every dollar of gas revenue that it has is produced from rates regulated by the State

of Ohio. Every item of property it has, including its high pressure lines, is depreciated at rates approved by the Ohio Commission and has been repeatedly valued by that Commission for rate making purposes. East Ohio is also regulated by Ohio as to accounting, financing, and other matters (R. 62).

In 1939 the FPC, in an *ex parte* proceeding and without a hearing, declared East Ohio to be a "natural-gas company" subject to its jurisdiction and made certain orders against East Ohio (R. 101-03). In doing so the FPC used a purely mechanical test of its jurisdiction by finding that there was an interstate movement of gas in the high pressure lines of East Ohio and by declaring that this was transportation, and the business of transportation, of natural gas in interstate commerce within the meaning of the Natural Gas Act. Over the years the FPC has made other similar orders against East Ohio but never in the ten years that have elapsed has it thought any one of its orders of sufficient importance to the administration of the Natural Gas Act to bring an enforcement proceeding under Section 20 of that Act. In 1947 the FPC made new orders in the case it started in 1939, to which East Ohio filed its Petition for Review in the United States Court of Appeals for the District of Columbia Circuit, resulting in the decision as to which a writ is now sought.

QUESTIONS PRESENTED.

East Ohio claimed below (R. 6-7) that it was exempt from FPC jurisdiction by reason of the language of Section 1(b) of the Natural Gas Act which declares that that Act "shall not apply to any *other transportation* or sale of natural gas or to the *local distribution of natural gas* or to the *facilities used for such distribution.*" (Emphasis supplied.)

It claimed that since all of its property served no other purpose than to supply local consumers its business was solely local distribution and its facilities, including high pressure lines, were used only for that purpose, within the exclusions of Section 1(b) of the Act.

It also claimed that the transportation through its own lines for its own local purposes of gas purchased by it at or near the Ohio boundary at prices regulated by the FPC was not transportation in a regulatory sense within the meaning of the Act but rather was "other transportation" within the exclusion of Section 1(b).

The FPC on the other hand, claimed (R. 202) that since an interstate movement of natural gas continued in East Ohio's lines, East Ohio was engaged in the transportation of natural gas within the meaning of the Natural Gas Act and therefore fully subject to its jurisdiction. It thus insisted upon the application of the purely mechanical test of an interstate movement which it was admitted continued in East Ohio's lines. There was, therefore, no issue before the court requiring any definition of interstate commerce.

The issues before the court required it to determine only (1) whether East Ohio's business is solely local distribution and its properties used only for such distribution, or (2) whether the transportation of its own gas for its own purposes of local distribution is transportation in any regulatory sense.

The FPC's brief makes a wholly misleading statement of the question below when it says, page 2:

> "The main question presented is whether, by virtue of its ownership and operation of these transmission pipe lines, East Ohio is engaged in 'interstate commerce' within the meaning of Section 2(7) of the Natural Gas Act and hence is a 'natural-gas company,' subject to the Federal Power Commission's jurisdiction under that Act."

As noted, the main question was and is whether East Ohio is excluded from FPC jurisdiction by the provisions

of Section 1, to which all other provisions and sections of the Natural Gas Act are expressly subject.

The court below correctly stated that "The very heart of the instant controversy is the definition of the nature of East Ohio's business" (R. 198). It then found what could scarcely be denied: that East Ohio "is engaged *solely* in the local distribution of natural gas to local consumers. *All* of its property, including the 650 miles of high pressure lines, is devoted to that sole purpose" (R. 202). It therefore found that East Ohio was excluded from FPC jurisdiction under 1(b) of the Act both because it was engaged solely in local distribution and because it was not engaged in transportation of natural gas in interstate commerce in any regulatory sense within the meaning of the Act.

REASONS FOR DENYING THE WRIT.

1. There is here no substantial question relating to the construction or application of the Natural Gas Act which has not been but should be settled by this Court.

Reasons 2 and 3 urged by the FPC for granting the writ (FPC Brief, pp. 15-18) are devoted to an argument that the decision below is wrong. Reason 4 (FPC Brief, pp. 18-20) seems to claim that a substantial federal question exists. (Reason 1, which is based on a misconstruction of the opinion below, is discussed later.)

In support of its claim of a substantial federal question the FPC relies upon the purely mechanical test of continuous interstate movement as the sole test of its jurisdiction. This Court has repeatedly held both under the Natural Gas Act and under the Federal Power Act that a mechanical or technological test is not the exclusive test of FPC jurisdiction.

Most recently in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, at

page 512, this Court, speaking through Mr. Justice Rutledge, said:

> "Those merely mechanical considerations are no longer effective, if ever they were exclusively, to determine for regulatory purposes the interstate or intrastate character of the continuous movement and resulting sales we have here." [Footnote omitted.]

That case recognized that the Natural Gas Act did not confer jurisdiction on the FPC over industrial sales in interstate commerce by even a "natural-gas company." However, if the claims of the FPC are sound, it would be held on the facts of that case that the continuance of an interstate movement of natural gas by the Anchor-Hocking Glass Company in its own lines after purchase makes that industrial company a "natural-gas company" within the meaning of the Natural Gas Act.

The court below did no more than apply to the undisputed facts of this case the weight which this Court held in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515, should be given to the fact "that the predominant characteristic of the company's over-all operation is that of a local and intrastate service" (p. 521), and that

> "The expression 'facilities used in local distribution' is one of relative generality. But as used in this Act it is not a meaningless generality in the light of our history and the structure of our government. We hold the phrase to be a limitation on jurisdiction and a legal standard that must be given effect in this case in addition to the technological transmission test.
>
> "Nor do we think the exemption of 'facilities used in local distribution' exempts only those which do not carry any trace of out-of-state energy." (p. 531)

We suggest that a mere question of application of the clearly expressed exemption from jurisdiction, contained in Section 1(b) of the Natural Gas Act, to the business of a single company does not raise any question of construction

or any substantial question of application of the Act, particularly where, as here, the controversy only arises because of the FPC's blind insistence on purely physical, mechanical or technological grounds as the sole basis of its jurisdiction.

Nor does the question gain importance from the FPC's statement that it has held other companies to be natural gas companies if that means, as it must, that these holdings were also made on the basis of purely technological tests. For obvious reasons the great natural gas pipe lines do not run through thickly populated communities. The local distributing companies must always build high pressure lines of greater or less length to the interstate pipe lines to receive natural gas from them. *If the purely mechanical test of a movement of gas in interstate commerce in these connecting lines is alone sufficient to establish the FPC's jurisdiction, then it has jurisdiction over practically all local distributing companies contrary to the plain and expressed intention of the Natural Gas Act.* By the same test every industrial company operating a stub line from an interstate pipe line to its plant would be a "natural-gas company" subject to FPC jurisdiction.

However, a wholly fallacious theory of jurisdiction, already repudiated by this Court, does not gain substance merely from the fact that if sound it would be widely applicable.

2. The decision of the court below does not rest on any improper application of the decisions of this Court.

The first reason assigned by the FPC for granting a writ is the apparent claim that the court below has, in the language of Rule 38(c), "not given proper effect to an applicable decision of this Court."

To sustain this claim the FPC brief, as noted, misstates the question involved in this case by claiming that the main question is whether "East Ohio is engaged in

'interstate commerce' within the meaning of Section 2(7) of the Natural Gas Act'' (FPC Brief, p. 2). It then claims that the court below defined interstate commerce so as to exclude "transportation within a single state as part of an interstate journey'' (p. 13) and that this was "the basis for the ruling below'' (p. 14).

None of these statements can be sustained upon a full and fair reading of the opinion. As previously noted, the real question was whether East Ohio's operations are excluded from FPC jurisdiction under Section 1(b) which, as this Court has held, determines "the Act's coverage."[1]

As noted, the court held that East Ohio was excluded from that jurisdiction both because of the local character of its business and properties and because the transportation of its own gas for its own purposes within the State of Ohio did not constitute transportation, or the business of transportation, in any regulatory sense within the meaning of the Natural Gas Act.

In making the latter holding the court particularly noted its awareness of the decisions of this Court as to the "ever-broadening concept of what constitutes interstate commerce'' (R. 203) —a fairly direct statement that it did not in any wise overlook or fail to give full effect to those decisions.

It was at all times admitted in this case that an interstate movement of gas continues in East Ohio's lines from points of connection with the interstate pipe lines for at least some considerable distance. No issue on that point was at any time made or discussed or decided.

Viewing its opinion as a whole the lower court merely refused to apply a solely mechanical test in determining the FPC's jurisdiction and specifically held (a) that the transportation by East Ohio of its own gas for its own purposes of local distribution was not transportation in any

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[1] *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507. 516.

regulatory sense and in effect came within the exclusion in Section 1(b) of "other transportation," and (b) that such transportation was incidental to and a part of local distribution and that all facilities used therefor were local distribution facilities, also within the exclusion of Section 1(b). Either holding excludes FPC jurisdiction even though an interstate movement of gas is continued in East Ohio's high pressure lines.

In determining these questions the court below not only recognized but correctly applied the applicable decisions of this Court.

We suggest that the petition for certiorari should be denied.

Respectfully submitted,

HERBERT S. DUFFY,
Attorney General of Ohio,
Attorney for Respondents the State of Ohio and the Public Utilities Commission of Ohio,

WILLIAM B. COCKLEY,
WALTER J. MILDE,
WM. A. DOUGHERTY,
STURGIS WARNER,
Attorneys for Respondent The East Ohio Gas Company.

KENNETH B. JOHNSTON,
Assistant Attorney General of Ohio,

C. W. COOPER,
Of Counsel.

No. 71.

In the Supreme Court of the United States

OCTOBER TERM, 1949.

FEDERAL POWER COMMISSION,
Petitioner,

v.

THE EAST OHIO GAS COMPANY,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE EAST OHIO GAS COMPANY.

WILLIAM B. COCKLEY,
WALTER J. MILDE,
WM. A. DOUGHERTY,
*Attorneys for Respondent
The East Ohio Gas Company.*

C. W. COOPER,
STURGIS WARNER,
Of Counsel.

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BRIEF FOR THE EAST OHIO GAS COMPANY.

OPINIONS BELOW.

The opinion of the Petitioner the Federal Power Commission (R. 170-180) is reported at 74 PUR (NS) 256 (1947). The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 197-206) is reported at 173 F. 2d 429 (1949).

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on February 14, 1949 (R. 206). The petition for a writ of certiorari was filed on May 13, 1949, and was granted on June 20, 1949 (R. 210), 337 U. S. 937. The jurisdiction of this Court is invoked under Section 19 (b) of the Natural Gas Act and under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

The principal question is too narrowly stated in the FPC[1] brief.

For reasons of safety and economy the great interstate natural gas pipe lines avoid thickly populated communities. Many purely local distributing companies therefore find it necessary to construct and operate high pressure transmission lines of greater or less length to connect their plants with these interstate pipe lines.

The primary question here is whether a company, like East Ohio, whose sole business is local distribution under local franchises, which transports no interstate gas for others nor for resale nor for any purpose other than to meet its local franchise obligations, is subject to federal regulation by the FPC as a "natural-gas company" under the Natural Gas Act solely because as a matter of necessary mechanics it continues for a greater or less distance an interstate movement of gas in its lines.

Other questions—on which the Court of Appeals did not pass—are whether, assuming East Ohio to be subject to FPC jurisdiction as a "natural-gas company," the FPC's orders in this case are arbitrary, unreasonable and invalid under the Natural Gas Act and the Constitution.

STATUTE INVOLVED.

The relevant parts of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821, and as amended by Act of February 7, 1942, c. 49, 56 Stat. 83, 15 U. S. C. § 717, *et seq.*) are printed in the Appendix to this brief. A pamphlet copy of the Ohio laws administered by the Ohio Commission will be supplied to the Court before argument.

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[1] We use "FPC" for the Federal Power Commission and "Ohio Commission" for The Public Utilities Commission of Ohio in view of the numerous references to each herein.

STATEMENT.

Because of serious omissions in the FPC's brief as to the nature of East Ohio's business and the extent of regulation in Ohio and its grossly exaggerated emphasis on East Ohio's connecting lines, we restate the material facts.

A. East Ohio Is Solely a Local Ohio Natural Gas Distributing Company.

East Ohio is an Ohio corporation whose sole business from the beginning has been and now is the direct local distribution of natural gas in Ohio (Item 11, Ex. A, Tr. Vol. I, pp. 81-82, Tr. Vol. VII, p. 2513; Tr. Vol. I, pp. 74, 86, 92, 108-A, 116, 133; R. 25). It serves more than 551,000 consumers in 69 northeastern Ohio municipalities, having an estimated population of more than 2,000,000 people, of which the principal are Cleveland, Akron, Canton, Massillon and Youngstown (R. 89; Ex. 3, Tr. Vol. I, p. 95, Tr. Vol. IV, p. 1967).

The total sales of East Ohio in 1945 were 77,428 million cubic feet (R. 89). All but Ohio field sales were sales at retail to domestic and industrial consumers through East Ohio's lines in the 69 Ohio communities served.[2] No sales to industrial or other consumers from pipe lines outside of those communities are made. No sales of any kind are made to any other company for resale (R. 16-17, Tr. Vol. I, p. 116).

In each of the incorporated communities served by East Ohio it has a local franchise for distribution (Tr. Vol. I, pp. 74-75, 117; Item 11, Ex. C, Tr. Vol. I, p. 82, Tr. Vol. VII, p. 2513). The rates for that service, both do-

[2] East Ohio's field sales of 627 million cubic feet in 1945 (the last full year in the record) are sales made either from the well mouth or from gathering lines to drillers, lessors and others. Field sales in their entirety are made from the Ohio producing fields and the gas is consumed entirely in Ohio (R. 16-17, Tr. Vol. I, p. 116).

mestic and industrial, as well as all the terms and conditions of that service, are fixed in each instance either by an ordinance passed by the municipal council and accepted by East Ohio, as provided in Ohio G. C. Secs. 3982 and 3983, or by order of the Ohio Commission, either under a proceeding initiated by East Ohio under Ohio G. C. Secs. 614-20 *et seq.* or by an appeal under Ohio G. C. Secs. 614-44 *et seq.* from a municipal ordinance fixing an unacceptable rate or unacceptable service terms. Regardless of how the rate is fixed a schedule covering domestic and industrial service is filed with the Ohio Commission. Ex. 6 (Tr. Vol. I, p. 122, Tr. Vol. IV, p. 1983) is a copy of all rate schedules on file with the Ohio Commission under which all gas in 1945, except field sales, was sold to domestic and industrial consumers (Tr. Vol. I, pp. 115-120).

East Ohio has never transported and does not now transport natural gas in interstate commerce, or otherwise, for any other person, nor has it ever held itself out as being willing to undertake this service (R. 23).

East Ohio for many years has purchased gas from Hope Natural Gas Company, an interstate wholesaling company, now a "natural-gas company" subject to FPC jurisdiction (FPC Brief, p. 40), with which this Court is familiar. These purchases in 1945 were about 62% of East Ohio's supply (R. 89). The Hope gas is delivered to East Ohio principally at two points on the Ohio side of the Ohio River (Ex. 5, Tr. Vol. I, p. 113, Tr. Vol. IV, p. 1981; R. 17-19, 32-33). The price at which all Hope gas is sold to East Ohio was fixed in a recent rate proceeding by the FPC and is set forth in schedules filed pursuant to orders of the FPC (R. 21-22; Item 11, Tr. Vol. I, p. 82, Vol. VIII, p. 2829).

In 1945 about 23% of East Ohio's supply was purchased by it from Panhandle Eastern Pipe Line Company (R. 89), another interstate wholesaling "natural-gas company" with which this Court is also familiar. This gas is

delivered by Panhandle to East Ohio at Maumee, Ohio, where the lines of the two companies connect (Ex. 5, Tr. Vol. I, p. 113, Tr. Vol. IV, p. 1981). This gas, first purchased in 1944, is likewise sold to East Ohio under a rate fixed by order of the FPC in a rate proceeding before it and is set forth in schedules filed pursuant to FPC orders (R. 21-22, Item 14, Tr. Vol. I, p. 82, Tr. Vol. VIII, p. 2898).

The remaining 15% of its 1945 supply East Ohio procured in the Ohio fields either by production or by purchase from other Ohio producers at or near the well mouth (R. 89). No gas has ever moved from East Ohio's pipe lines to points out-of-state (R. 19-20).

Connecting its various sources of supply with its 551,000 consumers East Ohio has the usual pipe lines of varying sizes and operating under various pressures, valve stations, regulator stations, compressing stations and other equipment, and an extensive underground storage area where both out-of-state and Ohio gas is stored during periods of slight demand for use in periods of large demand (R. 91, 17-23, 27-28, 55, 58-59).

The center of East Ohio's system for controlling gas supplies is its Gross Farm Station located just north of Canton, Ohio (R. 23, 58-59; Ex. 4 (Map), Tr. Vol. I, p. 108 A, R. 91). At this station the gas can be so controlled by valves and regulators and compressors as to flow to any part of the system where it is needed. This is true of the out-of-state gas as well as the Ohio gas (R. 23, 58-59). Generally speaking, the out-of-state gas, received at working pressures up to 320 pounds, does not require additional pumping to deliver it to East Ohio's consumers although a compressor station exists near Gross Farm for the purpose of supplying additional pressure when needed (R. 36-37).

The total number of miles of pipe line owned and operated by East Ohio as of December 31, 1945, was as follows, using the accounting classification required by the Ohio Commission (R. 88):

	Miles
Distribution lines	5,490
Storage lines	672
Field lines	1,011
Transmission lines	903
Total	8,076

Of the 903 miles of pipe classified accounting-wise as transmission lines, five multiple lines averaging a little over 100 miles in length carry gas purchased from Hope on the northern bank of the Ohio River to Gross Farm Station or to city plants. Another line, slightly longer, brings the gas purchased from Panhandle at Maumee, Ohio, to Gross Farm Station (Ex. 4 (Map), Tr. Vol. I, p. 108 A, R. 91).

All of East Ohio's property, regardless of its accounting classification, is used solely and exclusively to satisfy its local utility obligations (R. 25-28). If East Ohio's distribution business were terminated it would have no use whatever for any of its property (R. 25). Its property, its gas purchases and sales, its gas receipts and deliveries are all in Ohio (R. 13, 25).

These facts were correctly summarized by the court below when it found (R. 202):

> "* * * Not only does East Ohio produce or gather natural gas, but it strongly urges, and we believe the previously discussed facts clearly demonstrate, that it is engaged *solely* in the local distribution of natural gas to local consumers. *All* of its property, including the 650 miles of high-pressure lines, is devoted to that sole purpose." (Italics by court below.)

B. East Ohio Has Always Been Fully Regulated by Ohio Regulatory Authorities.

East Ohio is now, and since long before the passage of the Natural Gas Act has been, subject to complete regulation by the State of Ohio and its various agencies. These include in particular the various Ohio municipalities which East Ohio serves and the Ohio Commission.

Part of the State power over gas utilities is vested by the Ohio Constitution and statutes in Ohio municipalities under the "home rule" doctrine (The Constitution of the State of Ohio, Article XVIII, Sections 1, 3, 4, 5, 7; Ohio G. C. Secs. 3982, 3983 and others). Under this authority the Ohio cities grant franchises and make contracts with East Ohio for natural gas service, the rates therefor, or both (*supra*, pp. 3-4).

Since 1911 (102 Laws of Ohio 549 *et seq.*) the Ohio Commission has been vested by the State of Ohio with supervisory powers over the foregoing Ohio municipal authorities and with full regulatory powers over East Ohio. The Ohio Public Utilities Act defines as a public utility subject to its jurisdiction a company "engaged in the business of supplying natural gas for lighting, power or heating purposes to consumers within this state" (Ohio G. C. Secs. 614-2, -2a). "The jurisdiction, supervision, powers and duties of" the Commission are declared to extend to every public utility "the plant or property of which lies wholly within this state," to companies operating the same, and to the records and accounts of the business thereof done within this state (Ohio G. C. Sec. 614-4). The Commission is given power of general supervision (Ohio G. C. Sec. 614-8), to examine records (Ohio G. C. Sec. 614-7), to establish a system of accounts (Ohio G. C. Sec. 614-10), to require adequate service and facilities (Ohio G. C. Sec. 614-13), to prohibit rebates and discrimination (Ohio G. C. Secs. 614-14, -15), to determine rates other than those fixed by contracts with municipalities (Ohio G. C. Secs. 614-20 *et seq.*), to hear appeals from and set aside municipal ordinance rates and service provisions which have not been agreed upon and to fix substitute rates and service provisions (Ohio G. C. Secs. 614-44 *et seq.*), to require annual reports (Ohio G. C. Secs. 614-48), to fix proper depreciation charges and order a depreciation fund to be established (Ohio G. C. Secs. 614-49, -50), to control the issuance of

securities (Ohio G. C. Sec. 614-53), to control the purchase or sale of other utility property (Ohio G. C. Sec. 614-60), and numerous other regulatory powers customarily found in Public Utility Acts.

These other usual regulatory powers include authority over the abandonment of East Ohio's main pipe lines and gas lines (Ohio G. C. Secs. 504-2 and 504-3). This authority has been invoked, for example, to prevent East Ohio from terminating service (*Cleveland v. The East Ohio Gas Co.*, 34 Ohio App. 97, 170 N. E. 586 (1929), petition in error dismissed because no debatable constitutional question, 121 Ohio St. 628, 172 N. E. 379 (1930)).

Under the authority of these statutes East Ohio has been required to conform to the Ohio Commission's uniform system of accounts, to employ depreciation rates fixed by the Ohio Commission, to file annual reports on Ohio Commission forms, to submit to investigation and examination on various matters and the like (Tr. Vol. I, pp. 130-131). All of its properties, including its high pressure connecting lines of which the FPC makes such a point, have of course been subjected to examination, appraisal and review as to condition and utility in rate cases[3] (R. 24-25). The record shows in Exhibit 7 (Tr. Vol. I, p. 128, Tr. Vol. V, p. 2130) a list of merely the formal regulatory proceedings before the Ohio Commission involving East Ohio. They total as follows (Tr. Vol. I, pp. 128-130):

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[3] *The East Ohio Gas Company v. City of Cleveland*, 4 PUR (NS) 433 (1934); *Re East Ohio Gas Company*, 17 PUR (NS) 433 (1937); *The East Ohio Gas Company v. The Public Utilities Commission of Ohio, etc.*, 133 Ohio St. 212; 12 N. E. 2d 765 (1938); *East Ohio Gas Company v. City of Cleveland*, 27 PUR (NS) 387 (1939); *The East Ohio Gas Company v. Public Utilities Commission of Ohio, City of Cleveland v. Public Utilities Commission (Two Cases)*, 137 Ohio St. 225, 28 N. E. 2d 599 (1940); *The East Ohio Gas Company v. City of Cleveland*, 56 PUR (NS) 73 (1944).

Ohio Commission Proceedings	*No.*
Involving rates	160
Involving acquisition or sale of property	77
Relating to issuance of securities	11
Relating to accounting practice	4
Relating to termination or beginning of service	3
General complaints as to service, etc.	3
Total	258

It has very recently been determined by the Supreme Court of Ohio that irrespective of municipal contracts the Ohio Commission may in the interest of the Ohio public determine who shall and who shall not receive gas service from the lines of East Ohio during periods of gas shortages. *City of Akron v. Public Utilities Commission of Ohio*, 149 Ohio St. 347, 78 N. E. 2d 890 (1948); Cf. *Newman v. The East Ohio Gas Co.*, 149 Ohio St. 360, 78 N. E. 2d 897 (1948).

Thus East Ohio has no activities of any kind not under supervision and regulation by the State of Ohio and no public utility service or property not regulated in Ohio, and the court below so specifically found (R. 200):

> "There can be little doubt that petitioner is now and has been very thoroughly and completely regulated by the Ohio Commission."

C. History of the Proceedings before the Federal Power Commission and the Court Below.

In order that the Court may understand some references in the FPC's Opinions Nos. 37 (1 F. P. C. 586) and 158 (R. 170), and some later references in this brief, a chronological history of the East Ohio jurisdictional issue before the FPC is necessary.

Promptly after the passage of the Natural Gas Act in 1938 the City of Cleveland, then engaged in a rate controversy with East Ohio before the Ohio Commission, filed an application with the FPC requesting it to investigate the cost to East Ohio of transporting natural gas through

its lines from the Ohio River to Cleveland (Tr. Vol. X, p. 3318).[4] This proceeding was docketed as FPC Docket No. G-115. The FPC, completely *ex parte*, found East Ohio to be a "natural-gas company" under the Act and issued an order directing East Ohio to prepare and submit to it voluminous detailed data in connection with its pipe line property and operations (R. 100).

After applications to the FPC for a hearing and for a rehearing and stay, all of which were denied (Tr. Vol. X, pp. 3328, 3502, 3503, 3506), East Ohio filed a petition for review in the United States Circuit Court of Appeals for the Sixth Circuit, claiming that the FPC was without jurisdiction, that the order directed to it would entail very great and obviously useless expense and that the mere finding by the FPC that it was a "natural-gas company" would require it to comply with the general FPC accounting and other orders. The FPC moved to dismiss on the ground that the findings and the order made were not reviewable. Its position was that this order could be reviewed only if an enforcement proceeding by the FPC in the United States District Court were instituted pursuant to Section 20 of the Natural Gas Act. The Circuit Court of Appeals sustained the FPC's motion to dismiss. *East Ohio Gas Company v. Federal Power Commission*, 115 F. 2d 385 (C. C. A. 6th 1940).

Thereafter, to this date, no proceeding has been brought by the FPC in any court to enforce any of its orders against East Ohio.

In the meantime East Ohio has not complied with any general FPC orders as to accounting, annual reports or

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[4] The Ohio Commission and the Supreme Court of Ohio fully disposed of this rate litigation, including the cost of gas delivered to Cleveland, without FPC help in 1939 and 1940. *Re East Ohio Gas Company v. City of Cleveland*, 27 PUR (NS) 387 (1939); *The East Ohio Gas Co. v. Public Utilities Commission of Ohio, City of Cleveland v. Public Utilities Commission of Ohio (Two Cases)*, 137 Ohio St. 225, 28 N. E. 2d 599 (1940).

otherwise. It did, however, after the amendment of Section 7 of the Natural Gas Act on February 7, 1942, which instituted a system of requiring certificates of convenience and necessity from the FPC (56 Stat. 83, 15 U. S. C. Sec. 717f, pars. (c)-(g)), on three occasions file application for such certificates. The first was for a so-called "grandfather clause" certificate covering its existing operations (FPC Docket No. G-266; Item 11, Tr. Vol. I, p. 82, Tr. Vol. VII, p. 2513) and the others for additional pipe lines in Ohio, one to connect with Panhandle at Maumee, Ohio (FPC Docket No. G-458; Item 15, Tr. Vol. I, p. 82, Tr. Vol. VIII, p. 2929) and the other to add a further line to connect with Hope at the Ohio River (FPC Docket No. G-695; Item 19, Tr. Vol. I, p. 82, Tr. Vol. IX, p. 3261). In all of these cases East Ohio, because its status had not been determined by the courts, adopted the prudent course of applying to the FPC, setting forth the facts as to its operations and asking the FPC in the alternative to find (a) that East Ohio was not a "natural-gas company" under the Act and need not obtain a certificate from the FPC or, (b) if the FPC still adhered to the view that East Ohio was a "natural-gas company," to grant the certificates.[5] In each of these cases the FPC found East Ohio to be a "natural-gas company" and in each case granted the certificate sought.[6] Since East Ohio was not prejudiced by any of these orders of the FPC it could not obtain a review by the courts of the finding that it was a "natural-gas company" and it was so advised by its counsel (R. 28-29).

The proceedings in Docket No. G-115 long lay dormant before the FPC after the decision of the Sixth Circuit Court of Appeals in 1940, although in 1942 during the pendency

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[5] The FPC brief erroneously reverses the order of these requests, see fn. 2, pp. 4-5.

[6] *Re The East Ohio Gas Co.*, 4 F. P. C. 15 (1943); *Re The East Ohio Gas Co.*, 4 F. P. C. 497 (1944); *Re The East Ohio Gas Co.*, Docket No. G-695 (1946), R. 170, fn. 1.

of another rate proceeding before the Ohio Commission the Cities of Euclid, Cleveland and Lakewood filed so-called complaints which asked the FPC to find East Ohio a "natural-gas company" and to enforce its general accounting orders against it (Docket No. G-399, R. 109; Docket No. G-400, R. 114; Docket No. G-401, R. 119) and East Ohio promptly filed motions to dismiss these complaints (R. 125, 126, 128). At last in February, 1946, the FPC revived Docket No. G-115 by denying these motions to dismiss, consolidating these proceedings with it and ordering East Ohio to show cause why it should not comply with the 1939 FPC order in Docket No. G-115 applying specifically to East Ohio and all the FPC's general accounting and report orders (R. 129-136).

Following hearings in March, 1946, the FPC issued an order dated June 25, 1946 (R. 140-151), which again found East Ohio to be a "natural-gas company" subject to FPC jurisdiction and among other matters (1) ordered East Ohio to comply with all previous general FPC accounting orders applicable to all "natural-gas companies" subject to FPC jurisdiction;[7] (2) ordered East Ohio to comply with all previous FPC orders requiring the filing of annual reports by such "natural-gas companies";[8] and (3) ordered East Ohio within 90 days to file with the FPC the data, statements and reports required by its 1939 order in so far as it reasonably could and to inform the FPC when the remainder would be filed.

Applications for a rehearing and stay of this June 25, 1946 order were filed (R. 151, 163) and granted (R. 169). After further arguments before the FPC it issued its

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[7] No. 69: Ex. 1, Item 5, Tr. Vol. I, pp. 81-82, R. 71; No. 69-A: Ex. 1, Item 21, R. 83; and No. 73: Ex. 1, Item 8, R. 74.

[8] No. 63: Ex. 1, Item 1, Tr. Vol. I, pp. 81-82, R. 69; No. 80: Ex. 1, Item 11, R. 80; No. 86: Ex. 1, Item 16, R. 81; No. 100: Ex. 2, Item 1, Tr. Vol. I, pp. 81-82, R. 85; and No. 113: Ex. 2, Item 2, R. 87.

Opinion No. 158 on November 6, 1947 (R. 170-180), which included an order reaffirming its June 25, 1946, order. After further applications for a rehearing and stay (R. 180, 188) the FPC issued an order dated December 30, 1947 (R. 195) modifying its prior orders in respects not now material and otherwise denying the applications.

In both the review before the United States Circuit Court of Appeals for the Sixth Circuit and the revived Docket No. G-115 proceedings the State of Ohio and Ohio Commission intervened and became parties in opposition to the FPC's assertion of jurisdiction over East Ohio (R. 138, 139, 163, 188).

East Ohio, with the State of Ohio and the Ohio Commission intervening as petitioners, duly petitioned the United States Court of Appeals for the District of Columbia Circuit for review of these FPC orders as authorized by Section 19(b) of the Natural Gas Act (R. 1-11). That court (through Clark, *J.*, with Edgerton, *J.*, dissenting) reversed the FPC orders "in so far as they purport to pertain to East Ohio" (Opinions, R. 197-206; Judgment and Decree, R. 206). It held East Ohio was not subject to FPC jurisdiction under the Natural Gas Act and therefore found it unnecessary to pass on the other questions argued before it (R. 205).

D. The Exorbitantly Expensive and Useless Burden Sought to be Imposed on East Ohio and Ohio Gas Consumers by the Federal Power Commission.

The FPC orders so reversed by the court below on the issue of FPC jurisdiction required East Ohio to file annual financial and statistical reports in the form prescribed by the FPC covering *all* of East Ohio's properties and operations for 1939 and subsequent years and to conform *all* of its accounting for *all* of its properties and operations with the FPC system of accounts and the particular "original cost" determination instructions thereunder.

During each of the years since the passage of the Natural Gas Act, and before, East Ohio has been keeping its books of accounts in accordance with the uniform system of accounts prescribed or permitted by the Ohio Commission to be used, and has filed annual reports, depreciation rates and similar accounting and other data with the Ohio Commission (Tr. Vol. I, pp. 71, 130). The uncontradicted evidence shows that the cost to East Ohio of attempting to comply with FPC Orders Nos. 69, 69-A and 73 requiring reclassification and a statement of "original cost" of *all* of East Ohio's properties—general, distribution, transmission and production,—would now be between \$1,500,000 and \$2,000,000 (R. 25).[9]

It is important to note that admittedly East Ohio has no rates subject to FPC regulation (FPC Brief, p. 42).

It is also an important fact that under Ohio statutes the original cost of utility property, particularly as defined by the FPC in its Order No. 73 (R. 74), is not a recognized element in rate making by Ohio rate regulatory authorities. *The East Ohio Gas Co. v. Public Utilities Commission of Ohio*, 133 Ohio St. 212, 12 N. E. 2d 765 (1938); *The East Ohio Gas Co. v. Public Utilities Commission of Ohio, City of Cleveland v. Public Utilities Commission (Two Cases)*, 137 Ohio St. 225, 28 N. E. 2d 599 (1940); *City of Marietta v. Public Utilities Commission of Ohio*, 148 Ohio St. 173, 74 N. E. 2d 74 (1947).

At the various hearings before the FPC during the 10 year history of this matter there was never any evidence of any kind introduced by the FPC at any time that com-

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[9] This total cost was the direct testimony of East Ohio's President (R. 25), and despite extensive cross-examination on every other point by the FPC staff he was not asked one question on this estimate. Nor did the FPC put on a staff witness, subject to cross-examination, to testify on the basis of the FPC's "experience with other companies with greater property investment" that "this estimate is considerably exaggerated" (FPC Brief, p. 79; R. 179). The truth is this \$1,500,000 to \$2,000,000 cost never was a disputed fact.

pliance by East Ohio with the FPC's orders at the enormous expense involved would serve any useful purpose whatsoever—nationally or locally—or that failure to furnish it would do or had done any one any harm whatsoever.

Thus the FPC has sought in these proceedings to require East Ohio to spend between $1,500,000 and $2,000,000 for no reasonable or rational purpose. The only conceivable object is to keep the FPC expensively informed as to each detail of each of East Ohio's properties and operations, past and present—all of which were and are in Ohio, none of which involve rates or service subject to FPC jurisdiction and as to all of which East Ohio is already obligated to and does keep the Ohio Commission informed.

All this great additional expense for no useful purpose must in the end be borne as a part of the cost of natural gas from East Ohio by its customers in Ohio, as the evidence showed (R. 60). For these and other substantial reasons the State of Ohio and the Ohio Commission have from the beginning of the FPC assertion of jurisdiction over East Ohio been strongly opposed to that claim of power. We call particular attention to the statement of the Assistant Attorney General of Ohio at R. 61-63.

SUMMARY OF ARGUMENT.

I.

A. (1) The occasion for the passage of the Natural Gas Act was the impotence of the States to regulate the wholesale rates charged by interstate pipe line companies for gas sold for resale. The Act was not intended to cut down State power over interstate commerce but rather by filling this gap in regulation to make State power more effective. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507 (1947). Thus Congress intended the States to retain all the power they formerly had over interstate commerce.

(2) Long prior to the Natural Gas Act it was settled by this Court that the States could regulate interstate commerce in the absence of federal regulation where local interests were vital and any national interest slight. The *Cooley* formula is of course applicable to the natural gas industry. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra.*

Under the *Cooley* formula the State of Ohio had and has full power to regulate all of East Ohio's properties and operations. In transmitting solely its own gas from points of regulation by the FPC to its Ohio distribution areas, without making sales at wholesale to distributing companies, East Ohio moves gas in interstate commerce solely as incident to the business of local distribution in Ohio. The interests of the people in Ohio in all of those operations are vital and dominant. Any supposed national interest is illusory. There is here a "wide scope for local regulation without impairing the uniformity of control over the national commerce in matters of national concern and without materially obstructing the free flow of commerce." *California v. Thompson*, 313 U. S. 109, 113.

(3) There is no support in the legislative history of the Natural Gas Act for the FPC argument that East Ohio

"in particular" was intended by Congress to be subject to FPC jurisdiction. The legislative history actually shows that East Ohio and similar local distributing companies were not intended to be subject to FPC regulation.

B. The jurisdictional provisions of the Natural Gas Act exclude East Ohio.

(1) The Act subjects to FPC jurisdiction only companies engaged in the *business* of transporting or selling natural gas in interstate commerce of such a character as to require uniform federal regulation of such companies as public utilities. The FPC argument that the mere mechanical movement of interstate gas in East Ohio's pipe lines makes it subject to FPC jurisdiction overlooks two important factors.

First. The Act is not an Act to regulate gas or transportation. It is an Act to regulate certain interstate public utility aspects of the natural gas business. The Act itself shows that it is a public utility regulatory Act concerned with rates and service and other matters usual in regulatory Acts.

Second. Natural gas flows in continuous movement from producing wells to consumers' burner tips without regard to State lines or the dominance of national or local interests. Accordingly Congress did not make the test of FPC jurisdiction depend upon the mechanical test of interstate movement. Instead, it adopted the business test and sought to regulate federally only the business of interstate transportation for hire or interstate sales for resale. Any other business remained subject to State regulation.

A local distributing company that purchases interstate gas at a point of FPC regulation and merely carries that gas through its lines solely for the purpose of local distribution is not engaged in the "business of transportation" or even in "transportation" in any interstate public

utility or regulatory sense. It is not within the affirmative grant of power to the FPC.

Such transportation is "merely an incident to the use at the end," which end is local distribution. The *Pipe Line Cases*, 234 U. S. 548, 562 (1914). Such transportation is expressly excluded from FPC jurisdiction by Section 1(b) of the Natural Gas Act as "other transportation."

(2) In any realistic sense the business of East Ohio, and all other distributing companies similarly situated, is solely "local distribution" and the connecting lines between their distribution areas and the interstate pipe lines are in every sense "facilities used for such distribution," both expressly excluded from FPC jurisdiction by Section 1(b) of the Natural Gas Act. Indeed, in *East Ohio Gas Company v. Tax Commission*, 283 U. S. 465 (1931), this Court held that East Ohio's business was of such a local nature that the State of Ohio could impose a direct burden upon that business by levying an excise tax on its *entire* gross receipts. East Ohio's gross receipts then came, as they now come, solely from Ohio consumers and result from the operation of these connecting lines as well as its other local distribution properties as one business. It has no other receipts and no other business. But for its local franchises in various municipalities it would have no use whatever for these connecting lines.

(3) Other provisions of the Natural Gas Act show clearly its inapplicability to East Ohio. East Ohio has neither a rate nor a service that the FPC can regulate. It has no rates for transportation or for sales for resale. It engages in neither of these activities. Moreover, no other provisions of the Natural Gas Act, fairly construed, are applicable to East Ohio.

II.

A. The FPC's orders directed to East Ohio exceed its statutory authority. Section 8 and other Sections of the Natural Gas Act specifically provide that all FPC orders must be "necessary or appropriate in the administration of the act." The extensive data which the FPC has ordered East Ohio to produce in respect of *all* of its properties will cost up to $2,000,000. As the evidence showed it can serve no useful purpose whatsoever—either nationally or locally. It is neither "necessary or appropriate."

B. Under all the facts here involved these FPC orders invade reserved State powers. They are directed to no specific purpose, serve no useful end and thus are forbidden by the Fourth Amendment. The expense of compliance with these orders is so utterly disproportionate to any value of the information to be obtained that they constitute an invalid taking of East Ohio's property under the Fifth Amendment. The FPC's disregard of the evidence on this expense and this lack of utility and its purported reliance on matters not presented in evidence deprive East Ohio of procedural due process under this Amendment.

ARGUMENT.

I. THE NATURAL GAS ACT DOES NOT SUBJECT EAST OHIO TO THE JURISDICTION OF THE FEDERAL POWER COMMISSION.

A. THE NATURAL GAS ACT WAS CAREFULLY DESIGNED TO EXCLUDE ALL LOCAL DISTRIBUTING COMPANIES INCLUDING EAST OHIO EVEN THOUGH SOME MOVEMENT IN INTERSTATE COMMERCE WAS INVOLVED, SINCE THEY WERE EFFECTIVELY REGULATED UNDER THE EXISTING POWER OF THE STATES.

1. It has been settled by this Court that the Natural Gas Act was to assist State power and not to impair or reduce it in the slightest degree.

No detailed discussion of the history and purpose of the Natural Gas Act is necessary in view of the repeated and extensive consideration given to that history by recent decisions of this Court.[10]

Of that Act this Court said in 1947:

> "The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. This appears not merely from the situation which led to its adoption and the legislative history, including the committee reports in Congress cited above, but most plainly from the history of § 1 (b) in respect to the changes which took place in reaching its final form.

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[10] *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 502-503 (1949); *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, 514-519 (1947); *Public Utilities Commission of Ohio v. United Fuel Company*, 317 U. S. 456, 467 (1943).

"It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption." (*Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, 517-519 (1947).)

The gap in regulation which brought about the Natural Gas Act was the "impotence of the states to act in relation to sales for resale by interstate carriers." (*Id.*, p. 516.)

Plainly, therefore, if Ohio had the power to regulate the activities of East Ohio prior to the passage of the Natural Gas Act Congress did not intend by that act to reduce such power in any respect.

2. It has been settled by this Court that the States may regulate interstate commerce in the absence of federal regulation where local interests are vital and any national interest is slight as in the case of all East Ohio's operations.

We have previously set forth in detail (*supra*, pp. 6-9) the extent to which East Ohio has been regulated for 35 years by the Ohio Commission.

The court below summarized the undisputed testimony on this point as follows:

"The Ohio Commission was created in 1911. Ever since that date it has repeatedly and continuously exercised its regulatory powers over all the business activities and property of petitioner. This regulation has included the setting of numerous rates, the supervision of acquisitions and sale of property and security issues, the control of accounting practices, inauguration and termination of service, examining service complaints, and requiring the submission of detailed re-

ports to the Ohio Commission. Abundant state statutory authority exists for this regulation by the Ohio Commission and the state regulation authorized is mandatory, not permissive. As of the time of the hearings before the Commission in this case there had been a total of 258 formal regulatory proceedings before the Ohio Commission involving East Ohio. There can be little doubt that petitioner is now and has been very thoroughly and completely regulated by the Ohio Commission." (R. 199.)

Moreover, an examination of the FPC orders with which East Ohio has been directed to comply in this proceeding indicates that every one is an order which the State of Ohio had power to authorize its own Public Utilities Commission to make. The only thing the FPC orders require that the Ohio Commission has not already required is the determination of the "original cost" of East Ohio's properties to the persons first devoting them to public service. No one doubts that Ohio, as have other States, could have authorized its Commission to require that determination and to use it in fixing rates if Ohio had deemed it important.

The FPC brief suggests (pp. 23, 31), though it is apparently unwilling to argue the question directly, that the extensive regulation of East Ohio which the Ohio Commission has conducted for many years is unconstitutional and invalid. The failure to face that question directly is not surprising.

The great gap in regulation which the Natural Gas Act was designed to meet is illustrated by *Missouri v. Kansas Gas Company*, 265 U. S. 298 (1924), and *Public Utility Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927). Both of those cases held the States powerless to regulate interstate wholesale rates, in one case of gas and in the other of electricity. There was thus involved the regulation by a single State of matters directly affecting

the consumers of two or more States. When, therefore, this Court held that those particular subject matters were national in character and must be regulated, if at all, by Congress, it was simply applying the long-established *Cooley* formula (*Cooley v. Board of Wardens*, 12 How. 299 (1851)).[11] It thus determined that the national interest in protecting the consumers of several States against action by a single State over-balanced any interest of the State attempting regulation.

This aspect of those cases was explicitly developed in the *Attleboro* case, *supra*. There the Court pointed out the many problems which would arise between the States of Rhode Island and Massachusetts if the Court recognized the power of a State to regulate interstate wholesale rates.[12]

However, where the interests of the people of a single State are concerned there is a "wide scope for local regulation without impairing the uniformity of control over the national commerce in matters of national concern and without materially obstructing the free flow of commerce." *California v. Thompson*, 313 U. S. 109, 113 (1941).

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[11] See also Mr. Chief Justice Marshall's opinion in *Willson v. Black Bird Marsh Co.*, 2 Pet. 245 (1829), and Mr. Chief Justice Taney's opinion in the *License Cases*, 5 How. 504 (1847).

[12] "Furthermore, if Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress. * * *" (273 U. S., 90.)

In the recent case of *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, supra*, this Court said that any supposed national interest in sales by an interstate pipe line company to an industrial consumer was "largely illusory," that the State in which the sales were made had a "vital local interest," and concluded:

> "State power to regulate interstate commerce, wherever it exists, is not the power to destroy it, unless Congress has expressly so provided. It is the power to require that it be done on terms reasonably related to the necessity for protecting the local interests on which the power rests." (332 U. S., 522-523.)

In the present case the national interest is completely served by FPC regulation of Hope and Panhandle who sell to East Ohio for resale in the State of Ohio. The great gap in regulation with which Congress was primarily concerned in the Natural Gas Act is thus closed. The transmission of the gas purchased by East Ohio thereafter solely for the purpose of local distribution is a matter in which the interests of the State of Ohio and its citizens are vital and dominant. Any interest of the people of other States in that transmission is unimportant and illusory.

Ohio's interest in these lines that furnish the supply for the local distribution plants of East Ohio is just as vital, just as real and just as important in every respect as it is in the pipes laid in city streets. Both are necessary for local service, neither serves any other purpose.

True it is that this State power is not unfettered. It can only require that interstate commerce "be done on terms reasonably related to the necessity for protecting the local interests on which the power rests." (332 U. S., 523.) However, the fact that the power is not wholly unqualified is not a denial of the power or of its effectiveness for all present purposes. In fact it is a recognition of the power

itself. That power is obviously present as to all of East Ohio's properties and operations.

The only specific suggestion made by the FPC on the lack of such power appears in Opinion No. 158 where the FPC said (R. 176-177):

> "* * *, the State of Ohio lacks power to confer upon its Commission authority to require a certificate of public convenience and necessity for a transmission line used solely for transporting out-of-state gas, as, for example, East Ohio's 112-mile line connecting with Panhandle. Any prior doubt as to whether this be so, was resolved when Congress provided in Section 7(c) of the Natural Gas Act for national control of this very matter (*Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498, 506, 510; *cf. Colorado-Wyoming Gas Company v. Federal Power Commission*, 324 U. S. 626, 629-631)."

This statement is repeated in footnote 11 on page 23 of the FPC brief here.

The FPC's premise that the State of Ohio lacks complete power over East Ohio is erroneous; the cases cited by it are not in point and Ohio jurisdiction is complete.

In both the cases cited by the FPC out-of-state gas was purchased by a company which then transported it to local distributing companies to which it was resold for local consumption. Obviously both of these companies were wholesaling gas "for resale" and were subject to FPC jurisdiction. These cases neither held nor intimated that the State lacked power to authorize the State Commission to grant or withhold certificates of convenience and necessity from persons transporting gas in interstate commerce within the State for its own retail sales.

While the State of Ohio has never seen fit to require a certificate of public convenience and necessity from the Ohio Commission for the construction of natural gas pipe lines, eighteen other States do require such a certificate

before construction by a gas company may be undertaken.[13] Actually the initial construction of these lines in Ohio is dependent upon the acquisition of Ohio municipal franchises and other local Ohio permissions to use streets and highways. It accords with the Ohio municipal "home rule" doctrine (*supra*, p. 7) to let the practical determination of the building of necessary lines rest with the Ohio municipalities.

However, the State of Ohio does require the consent of the Ohio Commission to the abandonment of any main pipe lines and gas lines (*supra*, p. 8), since in this instance the general State interest may be more important than one local municipal interest.

The State of Ohio also requires an interstate carrier to procure a certificate of convenience and necessity to operate by motor over the State's highways (Ohio G. C. Sec. 614-88). This Court in *Bradley v. Public Utilities Commission of Ohio*, 289 U. S. 92 (1933), affirmed an order of the Ohio Commission denying such a certificate to an interstate motor carrier on the ground that the route specified was already so badly congested by motor traffic that the addition of the applicant's proposed service would cause excessive hazard to the safety of travelers and property upon that highway.

Thus the State of Ohio prior to the Natural Gas Act had full power to regulate every phase of East Ohio's

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[13] 14 Ala. Code § 332 (1940); Ariz. Code Ann. § 69-235 (1939); Col. Stats. Ann. Ch. 137 § 36 (1935); Idaho Code Ann. § 59-526 (1932); Ill. Ann. Stats. Ch. 111⅔ § 56 (Smith-Hurd 1934); Ind. Stats. Ann. § 54-601 (Burns 1933); Kan. Gen. Stats. Ann. § 66-131 (1935); Ky. Rev. Stats. § 278.020 (1946); Mich. Stats. Ann. § 22.142 (1937); Mo. Rev. Stats. Ann. § 5649 (1939); Nev. Comp. Laws § 6137 (1929); N. Y. Consol. Laws, Public Service Law § 68 (McKinney 1939); N. Car. Gen Stats. § 62-101 (1943); N. Dak. Rev. Code § 49-0303 (1943); Ore. Comp. Laws Ann. § 112-4, 131 (1940); 4 Utah Code Ann. § 76-4-24 (1943); Wisc. Stats. § 196.49 (4a) (1943); Wyo. Comp. Stats. § 64-304 (1945).

activities, as it actually did. The comprehensiveness of this power is not to be reduced in the least by reason of the fact that it cannot be exercised arbitrarily nor so as to impose unreasonable burdens on interstate commerce. Questions of limitation arise only after power is exercised.

When, therefore, we approach the construction of the Natural Gas Act it must be with full awareness that Congress not only intended to leave to traditional state regulation all of the power the States then possessed, but intended by that Act to supplement State power and make it more effective.

3. The argument that East Ohio "in particular" was intended by Congress to be subject to FPC jurisdiction is ill-conceived and wholly unfounded.

This section of our brief should have been unnecessary. The FPC, unable to point to a single phase of East Ohio's activities that requires any federal regulation, unable to designate an evil that Congress sought to remedy, nevertheless devotes eleven pages of its brief (pp. 20-31) to a charge that Congress was aiming the Natural Gas Act at East Ohio "in particular."

The charge is sought to be sustained by trivia based on some references to the case of *East Ohio Gas Company v. Tax Commission*, 283 U. S. 465 (1931), in a brief filed on the constitutionality of the Natural Gas Act, upon statements selected from the extensive hearings upon the various bills[14] that preceded the Natural Gas Act and upon the claim that the Federal Trade Commission in its final report

[14] H.R. 5423, 74th Cong., 1st sess., and H. R. 11662, 74th Cong., 2d sess. were predecessor bills. H.R. 4008, 75th Cong., 1st sess., was the last bill considered in Committee. It was reported out as H.R. 6586 and accompanied by House Report 709, 75th Cong., 1st sess. Three hearings were held: Hearings on H.R. 5423, 74th Cong., 1st sess.; Hearings on H.R. 11662, 74th Cong., 2d sess.; and Hearings on H.R. 4008, 75th Cong., 1st sess.

on the natural gas industry considered East Ohio a "typical natural-gas transmission company."

The FPC overlooks the holding in *East Ohio Gas Company v. Tax Commission*[15] in favor of a dictum. What this Court held was that East Ohio's business was of such a local nature that the State of Ohio could impose a direct burden upon all of that business by levying an excise tax based on its *entire* gross receipts. East Ohio's gross receipts then, as now, came solely from sales to Ohio consumers and resulted from the operation of its connecting lines and its other properties as a whole. It had and has no other receipts and no other business.

What this Court said in the opinion as to the transmission of gas in interstate commerce was said of transmission from one State to another where a change of title occurred at the State line as in the case of Hope's sale to East Ohio. This continuous movement was referred to as essentially national in character. The cases cited in support of it were the familiar cases: the *Landon*[16] case, the *Kansas Gas*[17] case, the *Peoples Gas*[18] case and the *Attleboro*[19] case. All

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[15] In *Connecticut Light & Power Company v. Federal Power Commission*, 324 U. S. 515 (1945). Mr. Justice Jackson distinguished *East Ohio Gas Company v. Tax Commission* in large part from the problem presently presented when he said:

> "But a holding that distributing gas at low pressure to consumers is a local business is not a holding that the process of reducing it from high to low pressure is not also part of such local business. In so far as the Commission found in these cases a rule of law which excluded from the business of local distribution the process of reducing energy from high to low voltage in subdividing it to serve ultimate consumers, the Commission has misread the decisions of this Court. No such rule of law has been laid down." (324 U. S. 534.)

[16] *Public Utilities Commission v. Landon*, 249 U. S. 236 (1919).

[17] *Missouri v. Kansas Gas Company*, 265 U. S. 298 (1924).

[18] *People's Natural Gas Company v. Public Service Commission*, 270 U. S. 550 (1926).

[19] *Public Utilities Commission v. Attleboro Steam and Electric Company*, 273 U. S. 83 (1927).

these were cases in which the particular business to be regulated clearly affected the people of more than one State.

This Court was not then considering separately for any purpose the transmission of gas by East Ohio through its lines connecting with Hope. It had no occasion to consider or apply the *Cooley* formula to that part of East Ohio's operations. In so far as the price of gas at the burner tips included the cost of that operation, this Court permitted it to be taxed by the State of Ohio as the receipts of purely intrastate business.[20]

The case was cited a number of times in a brief prepared by Mr. DeVane, Solicitor for the FPC, on the constitutionality of H. R. 11662. The brief is replete with citations of practically all the cases from this Court which had considered in any way the natural gas industry. *East Ohio v. Tax Commission* was simply one of these cases.[21]

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[20] Professor Powell interprets *East Ohio v. Tax Commission* as follows:

> "Following earlier cases Mr. Justice Butler declared this furnishing of gas at wholesale to the distributor to be interstate commerce, but he also not only declared but held that such furnishing was the end of interstate commerce. He expressly disapproved the analysis of Mr. Justice Day in the *Pennsylvania Gas* case in so far as it kept the interstate commerce unbroken until the gas was lit." [Footnotes omitted.] Powell, Note, *Physics and Law—Commerce in Gas and Electricity*, 58 HARV. L. REV. 1072, 1081 (1945).

[21] The manner in which the citations of the *East Ohio v. Tax Commission* case appear demonstrates quite clearly that the FPC's contention is unfounded. The FPC (Brief, p. 25) refers to four points at which the case was cited: (1) For the proposition that interstate transportation of gas is interstate commerce five cases were cited. One was the *East Ohio* case. (Hearings on H.R. 11662, p. 13); (2) For the proposition that Congress may regulate interstate commerce seven cases were cited. One was the *East Ohio* case. (*Id.* p. 14); (3) Mr. De Vane's brief stated the facts of the seven cases supporting the proposition that Congress may regulate interstate commerce. (*Id.* p. 16); (4) For the proposition that the decisions had distinguished the transportation of natural gas in high pressure and low pressure mains six cases were cited. One was the *East Ohio* case, and no special comment was devoted to it. (*Id.* p. 17.)

Nor do the incidental references to this case by Mr. Benton in hearings on H. R. 5423 indicate any Congressional intent to regulate East Ohio "in particular." Mr. Benton was Solicitor of the National Association of Railroad and Utilities Commissioners. Their attitude and his attitude both as to the limited problem involved and as to the necessity for not encroaching upon State power was fully expressed in the resolution adopted by the NARUC and presented at committee hearings. That resolution said:

> "Whereas the business of the transmission and sale of gas in interstate commerce at wholesale for resale, under decisions of the Supreme Court of the United States, is not subject to regulation by the States and in the absence of Federal legislation providing therefor, is left wholly unregulated; and
>
> "Whereas jurisdiction to regulate such business should be vested in some tribunal, so that gas supplied to distributing companies in interstate commerce may be obtained at just and reasonable prices; therefore be it
>
> "*Resolved*, That this association favors the enactment by Congress of legislation vesting jurisdiction in some one of the existing Federal regulatory commissions to regulate *the service of supplying gas, whether artificial or natural, produced in one State and sold at wholesale to a distributing company in another State, including rates applicable to such service*; and
>
> "*Resolved further, That Congress be asked to limit the jurisdiction granted strictly to gas transmitted and sold at wholesale for resale, and that such legislation be so drawn as in no way to limit or impair the power of the States to regulate intrastate and local service, and the rates applicable thereto*; * * *" (Hearings on H. R. 11662, p. 85; Hearings on H. R. 4008, p. 22) (Italics ours).

Thus Mr. Benton's State clients urged federal regulation on account of a single feature of the long-distance pipe

line business, namely, the inability of States to regulate interstate wholesale service. But these State commissioners were likewise conscious of the manner in which federal power feeds upon itself. They therefore asked Congress specifically to draft the legislation so as to limit federal regulation to the single problem involved and thus to give the FPC no excuse for encroaching upon the power of the States. How necessary this latter precaution was is well illustrated in this case.

There is no necessity for picking sentences here and there from their context in these voluminous proceedings to know precisely where Mr. Benton and his client stood at all times.[22]

The most important evidence as to whether East Ohio "in particular" was intended to be regulated, the FPC brief does not mention. Three men, residents of Cleveland and each thoroughly familiar with East Ohio's operations, participated in the proceedings prior to and at the passage of the Natural Gas Act. They were Mr. Justice Burton, then mayor of Cleveland—Cleveland was at that time engaged in a rate controversy with East Ohio—William C. Reed, Chairman of the Public Utilities Committee of the

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[22] The FPC states (Brief, pp. 28-29) that the amendment to Section 301(b) of H.R. 5423, which was recommended by Mr. Benton, would seem "to exclude companies such as East Ohio" but "was not adopted." The bill then under consideration was before the 74th Congress. It defined jurisdiction on the basis of facilities and in such a way as to be susceptible of a construction that it included some distribution business. Mr. Benton proposed an amendment, which clearly would have excluded from FPC jurisdiction such a company as East Ohio (Hearings on H.R. 5423, p. 1668). The bill finally enacted stated jurisdiction on the basis of the business done by the companies and not merely on the facilities operated, with the result that the amendment Mr. Benton suggested was no longer believed necessary. His attitude throughout was perfectly consistent with the NARUC resolution above quoted and if he had believed that the Natural Gas Act in final form was susceptible of a construction to include such companies as East Ohio he would have renewed his amendment.

Cleveland City Council, and Robert J. Bulkley, then United States Senator from Ohio.

Any fair reading of the statements made by these men either before Committee or in the debates in the Senate, discloses that all of them either expressed or assumed that the power of the State of Ohio was fully adequate for the regulation of East Ohio. They urged the passage of the Natural Gas Act in order that the Hope Company might be subject to FPC jurisdiction and its rates to East Ohio fixed.[23]

Finally, it is true that the Federal Trade Commission in its final report made a report on East Ohio as it did on many other companies. However, the significant thing about that report is not the misleading heading under which the report was made, to which FPC calls attention (Brief, p. 30), but the following statement referring specifically to East Ohio:

> "All its operations are under the supervision and regulation of the Ohio Public Utilities Commission in addition to the important rights of the cities to negotiate rate franchise agreements directly with the utility." (Sen. Doc. 92, 70th Cong., 1st Sess., Part 84A, p. 560.)

Thus the Federal Trade Commission's report which the FPC says "disclosed the necessity for the regulation [of East Ohio] provided by the Act" (Brief, p. 30) found no gap in the regulation of East Ohio.

The plain fact is that East Ohio presented no regulatory problem either to the State of Ohio or to the federal government. State commissions had ample power through jurisdiction over the local companies to regulate their activities back to the purchase from the pipe line company. It was at that point that their power failed, and this was

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[23] Burton: Hearings on H.R. 4008, pp. 48-52; Reed: *Id.* pp. 87-95; and Bulkley: 81 Cong. Rec. p. 9315.

the gap in regulation mentioned in all the extensive hearings.[24]

But the history of this legislation will be searched in vain for any statement that a regulatory gap or a problem existed in connection with the local companies or their movement of gas from interstate pipe lines to their local plants. In the particular case of East Ohio, since Hope was an affiliated company, the Ohio Commission could inquire into the reasonableness of Hope's price and allow or disallow the actual price paid by East Ohio as an operating expense of East Ohio. The Ohio Commission on several occasions prior to the Natural Gas Act valued Hope's properties, determined its operating expenses, depreciation and return and found a fair price at the Ohio River to be included in East Ohio's expenses. *East Ohio Gas Company v. Public Utilities Commission of Ohio*, 133 Ohio St. 212, 12 N. E. 2d 765 (1938); *East Ohio Gas Company v. Public Utilities Commission of Ohio*, 137 Ohio St. 225, 28 N. E. 2d 599 (1940). The Ohio Commission, of course, could not fix the Hope rate and this backhanded method of regulating Hope's rates was expensive and unsatisfactory. It was for these reasons and these alone that the representatives of the City of Cleveland urged the passage of the Natural Gas Act upon Congress. None of them suggested any problem as to East Ohio.

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[24] Of course there was also an obvious gap in the regulation of rates for the interstate transportation of gas—another form of interstate wholesale service. As Representative Halleck pointed out on the floor of the House, the Act was designed to fill this gap as well. 81 Cong. Rec. 6723 (1937). East Ohio had and has no transportation rates.

B. THE NATURAL GAS ACT DOES NOT INCLUDE EAST OHIO WITHIN THE AFFIRMATIVE GRANT OF JURISDICTION TO THE FPC AND SECTION 1(b) SPECIFICALLY EXCLUDES IT FROM THAT JURISDICTION.

1. East Ohio is not engaged in "transportation" within the affirmative grant of jurisdiction to the FPC and such transmission of gas as it does is excluded under the terms of Section 1(b) of the Natural Gas Act as "other transportation."

For convenience we reprint Sections 1(a) and (b) of the Natural Gas Act which "determines the Act's coverage."[25]

"Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the *business* of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

"(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution* or to the production or gathering of natural gas." (Italics ours.)

When consideration is given to all that the FPC has said in its opinions, orders and briefs, it is clear that its

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[25] *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U. S. 507, 516 (1947).

claim to jurisdiction here is bottomed solely on the mere mechanical continuance of an interstate movement of natural gas in East Ohio's lines. This it claims is "the transportation of natural gas in interstate commerce" and within the affirmative grant of power. The exclusion of "other transportation" in Section 1(b) it assumes means only "transportation in intrastate commerce" (Brief, p. 54).

Thus the FPC conceives that Congress enacted this legislation for the purpose of regulating any transportation of natural gas in interstate commerce—and to the very end of that mechanical movement. It argues from other sections of the Act, as will be shown later, that certain provisions of the Natural Gas Act are designed solely to regulate transportation. It makes no distinction as to whether that transportation is purely private in nature as, for example, a farmer transporting gas from his own well on one side of a state line to his house on another, or an industrial user operating his own stub line from his plant to an interstate pipe line, or, as in this case, a local distributing company procuring a supply of interstate gas from a pipe line company.

In effect it says that in all of these situations there is a "person engaged in the transportation of natural gas in interstate commerce" in a literal sense and therefore in a jurisdictional sense. Although this Court held in *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, supra*, that an interstate pipe line's sale of gas to an industrial user was not subject to FPC regulation, the present position of the FPC would require it to be held that such industrial user, in transporting that gas through its own stub line to its own plant for consumption, is a "natural-gas company" subject to FPC jurisdiction.

Such is the purely mechanical test of jurisdiction urged upon this Court. It is the means by which the FPC hopes

to obtain jurisdiction over every local distributing company in the United States which continues an interstate movement for any distance through a connecting line.

We say this advisedly. The identical mechanical argument advanced here is being advanced by the FPC's Staff Counsel to support the claim that the FPC has jurisdiction over the three large manufactured gas distributing companies in New York City which propose to buy natural gas from an interstate pipe line company for mixing purposes (FPC Docket Nos. G-1167, G-1171, G-1120). Here a proposed connecting high pressure line will be 23 miles long and all within the corporate limits of the City of New York. The brief filed by the FPC's legal staff in this case rested entirely upon the FPC's decision in the present *East Ohio* case and the arguments and citations urged upon this Court. Thus this East Ohio situation is being exploited by the FPC as the means by which it expects to obtain jurisdiction over the mixed gas distributing companies in Greater New York and over a large part of the natural gas distribution industry.[26]

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[26] The FPC's reply brief, p. 7, stated:

"The broad regulatory powers reposed in the New York Commission and its present ability to regulate the Applicants under such powers, as to the local operations of the New York Applicants, has not been and is not questioned. It is not an issue in this proceeding. The issue here presented is whether by reason of the construction and operation of the proposed facilities, the Applicants will thereby become engaged in the transportation of natural gas in interstate commerce. We have hereinbefore shown that they will be so engaged in interstate commerce. Therefore, the jurisdiction of this Commission attaches to the construction and operation of the proposed facilities to the exclusion of the jurisdiction of the State Commission."

In the conclusion of this brief it was further stated that "the New York Applicants will become natural-gas companies within the meaning of the Natural Gas Act upon completion of construction and commencement of operation of the proposed facilities and such construction and operation are subject to the requirements of Section 7 of the Natural Gas Act."

That such a purely mechanical test is not determinative of the construction of the Natural Gas Act and similar Acts this Court has held.[27]

In making these arguments to extend its jurisdiction the FPC, we suggest, overlooks two most obvious facts: (1) that the Act is a public utility regulatory Act of narrow scope, and (2) that Congress purposely and for good reason did not make the test of jurisdiction the mechanical movement of gas in interstate commerce.

As to the first of these, the purpose of the Act was not to regulate transportation or to regulate gas. Its purpose was to regulate only certain public utility aspects of the natural gas business as its provisions plainly show.

The heart and soul of every regulatory Act of this kind is the power conferred over rates and service. When we turn to Sections 4 and 5 of the Act we find that the only rates and service over which the FPC is given jurisdiction are rates to be charged either (1) in connection with transportation of natural gas in interstate commerce, or (2) rates for the sale of natural gas in interstate commerce for resale. It is given authority to fix or regulate no other rates or service. The other powers con-

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[27] *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498 (1942), p. 509: "In determining the scope of the federal power over the proposed extension of facilities and sale of gas, it is unnecessary to scrutinize with meticulous care the physical characteristics of appellant's business, in order to ascertain whether, as the court below held, the interstate commerce involved in bringing the gas into the state ends before delivery to distributors."

Connecticut Light & Power Co. v. Federal Power Commission, 324 U. S. 515 (1945), p. 531:

> "The expression 'facilities used in local distribution' is one of relative generality. But as used in this Act it is not a meaningless generality in the light of our history and the structure of our government. We hold the phrase to be a limitation on jurisdiction and a legal standard that must be given effect in this case *in addition to the technological transmission test.*" (Italics ours.)

ferred by the Act are aids for carrying out these important regulatory powers. They are provisions relating to accounting, depreciation, extensions and other matters necessary for the effective regulation of rates and service. In fact the Act has its substantial counterpart in the public utility Acts of many States and other similar Acts of Congress.

It was this character of the Act that enabled the House and Senate Committees in their reports on the purpose of the bill (H.R. 6586), subsequently passed as the Natural Gas Act, to declare:

> "The bill provides for regulation along recognized and more or less standardized lines. There is nothing novel in its provisions, and it is believed that no constitutional question is presented."[28]

It follows that the transportation in interstate commerce that gives jurisdiction to the FPC must be transportation involving interstate public utility obligations. In the case of East Ohio admittedly there are none. East Ohio has neither a rate nor a service that the FPC is authorized by this Act to regulate. It makes no sales in interstate commerce to anyone. It performs no interstate transportation service for anyone. It has undertaken no interstate public utility obligation of any kind in respect of sales, transportation or other service.

If this were the East Ohio Steel Company with steel plants in Cleveland, Akron and Youngstown, and if it purchased its gas from Hope and Panhandle Eastern and transported it to its steel plants precisely as it does, no one would seriously assert it to be a "natural-gas company" as defined in the Act. It would have no public utility obligations of any kind either intrastate or interstate. Even the Hope rate to it at the Ohio River and the Panhandle rate at Maumee would not be subject to FPC jurisdiction (*Pan-*

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[28] House Report No. 709, 75th Cong., 1st sess., p. 3. The Senate Report was identical.

handle Eastern Pipe Line Company v. Public Service Commission of Indiana, supra).

When we return to the facts of this case the only thing of a public utility nature added to the situation is local gas distribution in place of the manufacture of steel. This involves solely local public utility obligations properly regulated by the State.

In a regulatory sense as used in the Natural Gas Act East Ohio's activity in carrying purchased gas in the State of Ohio from points of purchase to its distribution centers, is not "transportation."

Coming then to the second thing that the FPC argument overlooks, namely, that Congress did not make the test of jurisdiction depend on an interstate movement of gas:

It is the peculiar nature of the natural gas business that where gas is produced in one State and transported and sold in other States there is a continuous movement of that gas from producing wells to consumers' burner tips, no matter how far distant. True, pressure is raised and lowered and the movement is more accelerated in winter than in summer. Nevertheless, it is a continuous movement that ignores State lines, sizes of pipe, amount of pressure, the ownership of the pipe through which it is passing, the classification of that pipe on the owners' books and other matters. All that Mr. Justice Jackson said of this same characteristic of the electric industry in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515, 529-530 (1945), is applicable to the natural gas business.

In this situation for Congress to attempt to determine for jurisdictional purposes at what point the movement in interstate commerce begins and at what point it ends as a matter of mechanics, would have been a hopelessly impossible task. This Court found no difficulty in *East Ohio Gas Company v. Tax Commission*, 283 U. S. 465 (1931), in

holding that the interstate movement ended at some point before it reached consumers' burner tips, but it made no attempt to say at exactly what point. Moreover on the technology of the industry it would have had the greatest difficulty in doing so. High pressure lines of large size exist in every purely local distribution system and the reduction in pressure is gradual and at many points.

Those who drafted the Natural Gas Act must have been aware of the impossible problem that would have been presented if jurisdiction of the FPC were attempted on the basis of where the movement in interstate commerce technically began and ended. They did know, however, from the survey of the natural gas industry made by the Federal Trade Commission that natural gas companies engaged in three kinds of business: (1) the business of production, (2) the business of the interstate pipe line companies which transport the gas from States of production to States of consumption and for the most part sell it there to local distributing companies, and (3) the business of local distribution. Moreover they knew that the gap in regulation of the industry that brought about the demand for the Natural Gas Act was associated solely with the business of the interstate wholesale pipe line company making wholesale sales for resale.

Accordingly Congress did not make the test of jurisdiction the mere mechanical movement of gas in interstate commerce. Instead it made the test the business in which the particular company sought to be regulated was engaged. In Section 1(a) of the Act it declared "that the *business of transporting and selling natural gas* for ultimate distribution to the public is affected with a public interest, and that federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." (Italics ours.). It is in the light of that

policy declaration that Section 1(b) and other Sections of the Act must be read.

It follows that when Section 1(b) declares that the provisions of the Act "shall apply to the transportation of natural gas in interstate commerce," it definitely means that it shall apply to the *business* of transporting natural gas in interstate commerce either for hire or for sales for resale. Only such a transportation business has interstate public utility aspects involving both rates and service that the States can not regulate. So construed the two Sections 1(a) and 1(b) are harmonious and fully effect the purpose of Congress in passing the Natural Gas Act. Moreover, this construction is consistent with the plain purpose of Congress to regulate only the interstate public utility aspects of the natural gas business.

When, therefore, we turn to the business in which East Ohio is engaged it is clearly not the business of transportation. East Ohio is no more in the business of transportation than would be a steel company transporting interstate gas through connecting lines to its plant. Such a company remains in the steel business, its transportation being merely an incident of the steel business with no public utility aspects.

This distinction between transportation of one's own property for one's own local business and the business of transportation involving public utility relations was recognized by this Court in *The Pipe Line Cases*, 234 U. S. 548 (1914). By the Hepburn Act of 1906 the Interstate Commerce Act was amended to apply "to any corporation or any *person or persons engaged in the transportation* of oil * * * by means of pipe line * * *." It will be observed that language we have italicized is precisely the language of Section 2 (6) of the Natural Gas Act defining a natural-gas company as a "person engaged in the transportation of natural gas." Among the companies ordered by the Commission to file schedules of rates was the Uncle Sam

Oil Company which procured its oil from its own wells in Oklahoma and transported it by pipe line to its own refinery in Kansas. This Court held that the Hepburn Act was not applicable to that company and, speaking through Mr. Justice Holmes, said (234 U. S., 562):

> "It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the act, *the transportation being merely an incident to use at the end.*" * * * (Italics ours.)

It cannot be emphasized too strongly that the question was not there, and is not here, whether the transportation was interstate. The sole question was whether there was a business in which the owner had assumed a public utility obligation of the kind which the Act sought to regulate.

This case and the principle on which it is based are sought to be distinguished by the FPC by reference to the later case of *Champlin Refining Co. v. United States*, 329 U. S. 29 (1946). In that case this Court distinguished the *Uncle Sam Oil Company* case, saying at page 34:

> "While Champlin technically is transporting its own oil, manufacturing processes having been completed, the oil is not being moved for Champlin's own use. These interstate facilities are operated to put its finished products *in the market in interstate commerce* at the greatest economic advantage." (Italics ours.)

Thus the sole reason for the distinction is that Champlin's finished products were being transported to an *interstate* market, whereas in East Ohio's case the gas is being transported to a purely *intrastate* market. The very ground of distinction stated in the *Champlin* case fully supports the reasoning that transportation conducted solely for the purpose of supplying a local and intrastate market

is not transportation in any national regulatory sense within the meaning of the Natural Gas Act.

In *United States v. Northwestern Ohio Natural Gas Company*, 141 Fed. 198 (D. Ct., N. D. Ohio 1905), the court held a company transporting its own gas from producing fields to distribution plants not to be a company subject to a tax as "owning or controlling any pipe line for transporting oil or other products." The opinion said (141 Fed., 201):

> "To thus transport the gas by means of pipes does not constitute the company a transporting company, *nor is it thereby engaged in the business of transporting oil or gas by means of pipe lines. Such transportation is, in the most definite sense, merely incidental.* It is not, in any respect, to be distinguished from the business of transporting gas in which a manufactured gas company is engaged; such company having a plant within the limits of a city, and conducting gas which it thus manufactures through the streets of the city to the places where its customers consume it. I think it would be an absolute denial of justice to come to any other conclusion." (Italics ours.)

It seems clear, therefore, that East Ohio cannot be held to be either in the *business* of transporting interstate gas or in the *business* of making interstate sales of gas, but that such transportation as it does is, as Mr. Justice Holmes said, "merely an incident to the use at the end," which end is the *business* of local distribution and sale in purely intrastate commerce fully subject to State regulation.

As this Court said in *Missouri v. Kansas Gas Co.*, 265 U. S. 298, 309 (1924):

> "The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and *this is so whether the local distribution be made by the transporting company* or by independent distributing companies." (Italics ours.)

This construction of "transportation in interstate commerce" gives meaning to the exclusion of Section 1(b) that the Act shall not apply to "any other transportation," thus expressly excluding from Commission jurisdiction all transportation in interstate commerce for private purposes, transportation which has no interstate utility aspects.

The only meaning that the FPC has ever given to the exclusion of "any other transportation" is that it excludes from FPC jurisdiction purely intrastate transportation, a subject over which Congress has no direct control. (FPC Brief, p. 54.) In other words, the claim is that this exclusion is solely of denied power.

However, in declaring that the Act "shall not apply to any *other transportation or sale* of natural gas" it is clear that "other sale" means "other sales in interstate commerce" save only sales for resale. In *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra,* it was squarely held that the sale of gas there excluded from FPC jurisdiction by this language was a sale in interstate commerce, a matter over which Congress might have conferred jurisdiction upon the FPC but did not.

When therefore Congress provided in the same sentence that the Natural Gas Act should not apply to any "other transportation or sale" it is clear that Congress meant not merely to exclude intrastate transportation, as the FPC claims, but any transportation in interstate commerce of a character which had no interstate public utility aspects or which the States had the power to regulate.

Upon any realistic, practical construction of the language of the Natural Gas Act such interstate movement of natural gas as continues in the lines of East Ohio and other distributing companies similarly situated is not "transportation" intended to be regulated by the Natural Gas Act but is "other transportation" excluded by the Act.

2. East Ohio is specifically excluded from FPC jurisdiction since its sole business is "local distribution" and all its facilities are "used for such distribution."

The court below found that East Ohio "is engaged *solely* in the local distribution of natural gas to local consumers. *All* of its property, including the 650 miles of high pressure lines, is devoted to that sole purpose." (R. 202) (Italics are those of the court.)

If the FPC had not had the mistaken notion that its jurisdiction depended solely on the mechanical continuance of a movement of gas in interstate commerce, it would have been compelled on the record to make a similar finding. There is not the slightest evidence in this record at any point that East Ohio has any business other than local distribution, or any utility obligations other than those arising out of local distribution, or any facilities used for any other purpose.

In making the above finding excluding FPC jurisdiction, the court below did no more than give effect to the predominant characteristic of East Ohio's over-all operations, including its pipe lines, as those of a local and intrastate service.

Substitute natural gas for electricity, other figures and places for those used and the following statement of Mr. Justice Jackson in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515, 521-522 (1945), is here applicable:

> "It is not denied, although the Commission's findings and opinion make no mention of the fact and appear to have given it no weight, that the predominant characteristic of the company's overall operation is that of a local and intrastate service. It serves one hundred seven towns, cities, and boroughs of Connecticut with a total population of about 660,000 and in addition supplies substantially all the power used by local companies which serve communities of Connecticut having a population of 130,000. It owns no lines crossing the Connecticut boundary and does not con-

nect with any other company at the boundary. It has no business other than Connecticut service for which it needs any facilities whatever, and if local distribution service were terminated, no remaining purpose or use of any kind is suggested for the facilities in question. Its purchases and sales, its receipts and deliveries of power, are all within the state. Its rates and its fiscal and accounting affairs are fully and so far as appears effectively regulated by the State of Connecticut."

As previously pointed out many local distribution companies find it necessary to construct high pressure transmission lines to the interstate pipe lines supplying them and thus continue an interstate movement for a greater or less distance. Under such circumstances any realistic interpretation of the Natural Gas Act must recognize that the transportation through these stub lines is merely an incident of the company's sole business of local distribution. Facilities used for this transmission are in every real and practical sense facilities used for that local business. They serve no other purpose.

It is no answer to this to say, as does the FPC (Brief, p. 54), that all facilities used in the production and transmission of natural gas have for their ultimate object supplying gas to domestic, commercial and industrial customers and that application of any theory of end use would oust the FPC from all jurisdiction. Panhandle Eastern and other pipe line companies move their gas from the Southwest into Ohio and other States to carry on their business which is sales to distributing companies for resale. The business at the end is sales for resale in interstate commerce. The facilities used by them are facilities used for sales for resale in interstate commerce. In other words, the end use of their facilities is sales clearly subject to FPC jurisdiction.

On the other hand, the end use of the local distributing company is sales in intrastate commerce. The facilities

used merely to move gas to the local plants from the interstate pipe line are in every real and proper sense purely incidental to local business.

This practical concept was recognized in *East Ohio v. Tax Commission* where this Court held that the *entire* gross receipts of East Ohio's business were subject to an excise tax levied by the State of Ohio. These receipts were in part the result of the operation of the connecting facilities here under consideration and included whatever compensation East Ohio received for the use of these facilities. Nevertheless this Court held all gross receipts to be receipts from an intrastate business and subject to tax. We suggest the practical situation now under consideration is the same as it was then, and that East Ohio's entire pipe line system is a unified system used solely for local distribution.

The very fact that Congress was careful to stop FPC jurisdiction as to sales in interstate commerce at the wholesale point clearly evidences its intention to exempt from FPC regulation not merely local distribution plants but any facilities incidentally used to carry out local utility obligations even though those facilities happen to carry some interstate gas.

Either that is true or a very large section of the purely local distribution business in this country will be subjected to a regulation that Congress never intended.

3. The provisions of the Natural Gas Act as a whole show its inapplicability to East Ohio and other local distributing companies.

We have previously pointed out that the most important grant of power to the FPC, namely the power to regulate rates conferred by Section 5(a), is not applicable to East Ohio. It has no rates for transportation or for sales for resale. It engages in neither of these activities.

In spite of this admitted situation and the strong inference to be drawn from it that the Act is not applicable

to East Ohio or similar companies, the FPC asserts (Brief, pp. 43-50) that the provisions of Section 5(b) and of Section 7(a), (b) and (c) indicate an intention of Congress to regulate the interstate transportation of natural gas as such, and presumably whether or not there are any interstate public utility obligations assumed in connection with that transportation. These specific sections it claims were intended to regulate such companies as East Ohio and to permit the FPC to determine East Ohio's costs of production and transportation, all in Ohio (even though the FPC can not fix a rate for any Ohio service); to order East Ohio to establish connections and sell natural gas to distributing companies for resale (although such companies are not presently served by East Ohio); and to decide whether East Ohio can extend or abandon its pipe lines in Ohio.

This entire argument is without any reasonable foundation. Neither Section 5(b) nor any part of Section 7 as originally enacted was intended to be an independent regulatory provision. Both of these sections limit the FPC's jurisdiction to a "natural-gas company," a term meaning companies subject to FPC jurisdiction in accordance with earlier Sections of the Act. Moreover there is nothing in the legislative history of these Sections which indicates any intention on the part of Congress to extend the meaning of "natural-gas company" beyond the scope of Section 1 of the Act, or that indicates that transportation of natural gas alone was intended to be regulated. Indeed the history of these Sections shows quite clearly they were never intended to apply to companies like East Ohio.

Section 5(b) of the Natural Gas Act, as finally passed, is as follows:

> "(b) The Commission upon its own motion or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the

cost of the production or transportation of natural gas *by a natural-gas company* in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas." (Italics ours.)

As the Act came to the floor of the House after all hearings had been held, Section 5(b) did not contain the words "by a natural-gas company," italicized above. They were inserted by what is known as the Boren amendment made on the floor of the House and accepted by the Committee on Interstate and Foreign Commerce. (See 81 Cong. Rec., p. 6728.)

It will be observed that without the italicized words the paragraph gave the FPC a roving commission to make such investigations without any certainty as to what, if any, limitations were intended. Mr. Boren had from the beginning been concerned with this investigatory power of the Commission and had interrogated several witnesses concerning the necessity for it. Mayor Burton had told him that it might be useful in Ohio for ascertaining all the facts as to the Hope Company in West Virginia. Mayor Burton made no suggestion that it would be useful as to East Ohio for he said the Ohio Commission was "getting all the facts in Ohio" (Hearings on H.R. 4008, pp. 49-50).

Later Mr. Maltbie of the New York Commission was asked by Mr. Boren about the necessity for Section 5(b). Mr. Maltbie said that if the FPC would regulate the price at which the gas was sold to the local distributing company "we do the rest, taking it down to the consumer.

> "That leaves the Federal Power Commission in its own field to act as it may be authorized. It leaves the State Commission in its own field to act as it may be authorized." (Hearings on H.R. 4008, pp. 112-113.)

Thus convinced that FPC investigatory power should be confined Mr. Boren offered his amendment and said:

"This amendment clarifies the jurisdiction as between Federal and State Governments, and assures us that the Federal Government will not go into a realm where a State government already has proper authority to handle the problem." (81 Cong. Rec., p. 6728.)

Thus the declared purpose of the author of the amendment, as well as its language, shows that it was not intended to extend FPC jurisdiction to companies not otherwise within its jurisdiction as "natural-gas companies." It further shows that Section 5(b) was merely intended to give the FPC investigatory powers, to assist State commissions on requests, in cases where having jurisdiction over a "natural-gas company" such an investigation and determination of costs might be useful in the regulation of rates still subject to State jurisdiction.

This still leaves a very useful function for the FPC under 5(b). As this Court has held, the Act leaves the regulation of industrial and other local consumer rates by pipe line companies to the States. It may well happen that in the regulation of industrial rates, for example, as in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra,* it will be necessary for the State Commission to ask the FPC to investigate the cost of production and transportation of the pipe line company outside the State regulating the rate. Under such circumstances Section 5(b) authorizes the FPC to make any necessary investigation or determination to assist the State Commission in fixing such local industrial rates.

Certainly the history of this section and the purpose and form of this amendment do not in the least indicate any intention of Congress to expand the meaning of "natural-gas company" beyond the definition made in the early Sections of the Act.

Moreover, it completely denies the FPC argument that Mr. Boren not only failed to limit Section 5(b) by his amendment but that he unwittingly broadened the scope of the entire Act.

Nor do the various paragraphs of Section 7 of the Act support the FPC's theory that it is an independent regulatory provision. Paragraph (a) is a perfectly usual regulatory provision, having its counterpart in many public utility acts. It authorizes the Commission to direct a "natural-gas company" to extend or improve facilities and "to establish physical connections of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public."

This language has obvious applicability to interstate pipe line companies most, if not all, of which are already in the business of wholesaling gas to local distributing companies. It is equally obvious that it can be applicable to few, if any, of the local distributing companies which transport supplies purchased from interstate pipe lines to their local plants.

Moreover any attempt to make it applicable to such a local distributing company as East Ohio presents a serious question of the constitutionality of the Section.

The record is clear that East Ohio does not now and never has held itself out as willing to transport and sell natural gas, either in interstate commerce or otherwise, to any local distributing companies for resale. No part of its property has ever been devoted to that wholesale utility service.

Time and again this Court has held that a company cannot, consistently with due process, be required to undertake a business in which it has never voluntarily engaged. As this Court said in *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 595 (1915):

> "If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight."

In *Interstate Commerce Commission v. Oregon-Washington R. R. and Navigation Co.*, 288 U. S. 14 (1933), this Court

to avoid unconstitutionality interpreted the Interstate Commerce Act as not requiring a similar extension of public utility service; so should the Natural Gas Act be construed here.

In two recent cases it has been held that corporations transporting gas from their own fields in one State through their own transmission lines for purposes of distribution by them to the public in another State cannot be required to carry gas for other persons. *Texoma Natural Gas Company v. Railroad Commission of Texas*, 59 F. 2d 750 (D. Ct. W. D. Tex. 1932); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55 (1937). See also *Louisville and Nashville Railroad Company v. West Coast Naval Stores Company*, 198 U. S. 483 (1905), *Weems Steamboat Company v. People's Steamboat Company*, 214 U. S. 345 (1909), *The Pipe Line Cases*, 234 U. S. 548 (1913).

Thus not only is it apparent that Section 7(a) does not expand in the least the meaning of "natural-gas company" but that if it is applied to a company situated like East Ohio it is unconstitutional.

We observe that the FPC brief claims (p. 61) that *Federal Power Commission v. Natural Pipe Line Co.*, 315 U. S. 575 (1942), puts this constitutional question to rest. The fact is that all this Court considered and decided in that case was that federal regulation of interstate wholesale rates was constitutional.

Section 7(b) forbids a "natural-gas company" to abandon any facilities "subject to the jurisdiction of the Commission, or any service rendered by means of such facilities" without the approval of the Commission. The only "service rendered" by East Ohio by means of any of its facilities is local distribution under local franchises. Surely Congress did not intend East Ohio to submit to the FPC the question of whether it could abandon a transmission pipe line running, for example, from Gross Farm Station to Youngstown, or other community. The State

of Ohio already by Ohio General Code Sections 504-2 and 504-3 has imposed on East Ohio the necessity of obtaining its consent before abandoning any facilities or service rendered thereby. Must both the Ohio Commission and the FPC consent? And what is to happen if they do not agree?

Section 7(b) read as applicable to an interstate pipe line company transporting gas from producing fields in one State and selling gas to distributing companies and industries in other States makes complete sense. Read as applicable to East Ohio and similar local distributing companies it provides no regulation not already fully imposed by the power of the States. Certainly it adds nothing to the definition of a "natural-gas company" to which its applicability is limited.

Likewise Section 7(c) in its original form if read with an interstate pipe line system in mind makes complete sense and effective regulation, but read with East Ohio in mind is an obvious intrusion upon State power. It provided that "no natural-gas company" shall extend its facilities "for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company," or extend facilities or sell in any such market, without obtaining a certificate of convenience and necessity from the FPC. The intended application of this Section and indeed of the whole Act is shown by the last sentence, which in part declares:

> "* * * *it being the intention of Congress that natural gas shall be sold in interstate commerce for resale* for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (Italics ours.)

Certainly that declaration of intention as to natural gas sold for resale for ultimate public consumption is in no sense applicable to East Ohio but is perfectly applicable to the great interstate pipe line companies.

As a matter of fact Mr. Lea, Chairman of the House Committee on Interstate and Foreign Commerce, assumed complete responsibility for Section 7(c), explaining that since the "natural-gas companies" were being brought under regulation it was only fair that they should be given the protection of this Section against competition. He said that he regarded regulation as "monopoly controlled in the public interest" (Hearings on H. R. 4008, pp. 81-83).

In accordance with Mr. Lea's views Section 7(c) as initially enacted provided for a certificate of public convenience and necessity only when one "natural-gas company" proposed to invade a market already served by another "natural-gas company." The Section as originally enacted simply protected the newly regulated "natural-gas companies" against competitors.

Later, in 1942, Section 7(c) was amended (56 Stat. 83) to extend greatly the power of the FPC in this field. However, the definition of "natural-gas company" has never been changed and we must look to the Act in its original form for assistance in determining its meaning. Original Section 7 and its history give no help to the claims of the FPC for power over East Ohio and the other local distributing companies throughout the country.

A construction of the Natural Gas Act which denies the FPC jurisdiction over East Ohio is not merely in complete conformity with the express language of the Act but fully accomplishes every purpose Congress had in mind in its passage. It fills the gap in the regulation of the industry that was the occasion of the Act. Henceforth no public utility obligation of any kind in connection with the natural gas industry will go unregulated. The States will continue to regulate, as they have effectively done for many decades, all the activities of such companies as East Ohio. The pipe lines which the States are unable to regulate will be the exclusive province of the FPC. Dual regulation will be avoided.

Affirming the judgment below will merely deny a bold attempt of the FPC to extend its jurisdiction far beyond the language of the Act and the intention of Congress.

II. THE BURDEN ON EAST OHIO AND ON OHIO CITIZENS OF COMPLIANCE WITH THE FEDERAL POWER COMMISSION ORDERS HERE UNDER CONSIDERATION, CONSIDERED IN THE LIGHT OF THEIR END RESULT, IS SO GREAT AS TO MAKE SUCH ORDERS TRANSGRESS STATUTORY AND FEDERAL CONSTITUTIONAL LIMITS.

As to the federal constitutional questions which East Ohio has pressed upon the FPC since the beginning of the jurisdictional issue, the FPC said in Opinion No. 37 (*In the Matter of The East Ohio Gas Co.*, 1 F. P. C. 586, 592 (1939)):

> "It is not within the Commission's province to pass upon the constitutionality of statutes enacted by Congress."

In its Opinion No. 158 the FPC ignored these questions except for stating on the matter of taking property for public use without just compensation (R. 179):

> "As to cost of compliance, that alone is no bar."

A. THE FEDERAL POWER COMMISSION'S GENERAL POWERS UNDER THE NATURAL GAS ACT MUST BE EXERCISED REASONABLY TO SERVE THE OBJECTIVES OF ITS REGULATION AND THE ORDERS HERE INVOLVED GO BEYOND THAT LINE OF REASONABLENESS.

If by Section 1 of the Natural Gas Act East Ohio is not subject to FPC jurisdiction then of course nothing that is said in the later Sections of the Act can be used to support the FPC orders here involved (*supra*, p. 12). Let us assume, however, that the FPC's mechanical theory

is correct and that technically East Ohio is a "natural-gas company" under the Act. Does it follow, as the FPC brief claims (pp. 63-80), that any order the FPC gives East Ohio is valid under the Natural Gas Act and the federal constitution? That is a claim for *absolute* administrative finality.

The brunt of the FPC argument, based on its italicized version of the statute, is that under Sections 6(b), 8(a) and 10(a) "every natural-gas company" must file inventories, keep prescribed accounts, make reports and so forth. The FPC does not point out that under Section 6(b) the obligation upon the companies is "upon request" by the FPC, and it does not italicize the provisions in Sections 8(a) and 10(a) that the special accounting and reports prescribed by the FPC must be "necessary or appropriate for purposes of the administration of this act." Indeed Section 16 places this limitation upon the power of the Commission with respect to all its orders, rules and regulations. In other words, what is important is not the language used in the Act as to the obligations of "natural-gas companies" but the limitations, expressed and inherent, upon the FPC's general powers.

As to the express statutory limitations it is apparent that the Commission's orders in every case must be "necessary or appropriate" to some legitimate end within its statutory power. Plainly the circumstances vary as to what is necessary or appropriate and doubtless latitude is to be accorded the FPC in such determination. But if the circumstances are such that an order is neither "necessary or appropriate" the FPC has overstepped the authority Congress gave it.

It is an amazing circumstance that nowhere in this East Ohio proceeding has the FPC undertaken to show by evidence or otherwise that its specific 1939 orders to East Ohio or its general report and accounting orders which it

seeks to apply to East Ohio are "necessary or appropriate" either to its FPC functions or to those of any one else.

It has rested its case upon the simple theory that it has jurisdiction over East Ohio and that any specific orders it gives to East Ohio and any general orders it makes applicable to all "natural-gas companies" are, *ipso facto*, "necessary or appropriate."

It is evident that the same accounting and reports are not "necessary or appropriate" for interstate pipe lines and wholesaling companies and for local distributing companies. In the one case the FPC must fix rates; in the other it can not. It may be necessary to assist in fixing wholesale rates for the FPC's system of accounts as now prescribed to be applied to all of a wholesale company's operations. *Northwestern Electric Co. v. Federal Power Commission*, 321 U. S. 119 (1944), upon which the FPC relies (Brief, pp. 72, 75, 77-78), was, of course, such a case within the FPC's electric jurisdiction. On the other hand, when local distributing companies, such as East Ohio, own and operate only local property within one State, maintain complete accounts already prescribed by a State commission and have no rates or charges subject to FPC jurisdiction, such federal accounting uniformity is patently unnecessary. Indeed we suggest that Congress recognized this inherent lack of such necessity when it said in Section 1(b) of the Act that the "provisions of this act," and without any exception as to any of them, shall not apply to "production" or "gathering" or "to the local distribution of natural gas."

Perhaps in extraordinary circumstances some necessity for that federal accounting uniformity might exist, but here the FPC has introduced no evidence of any kind, has made no showing of any kind, indeed has made no claim of any kind that in fact such a necessity or appropriateness does exist.

It is also evident that a federal regulatory commission must consider the expense involved of complying with its

orders. Here, as the record shows, the FPC never did. Now before this Court it claims that the $1,500,000 to $2,000,000 which its orders here involved would cost East Ohio and Ohio gas consumers is not "unreasonable" (Brief, p. 79). It refers to *American Telephone & Telegraph Co. v. United States*, 299 U. S. 232 (1936), where the cost of compliance with federal commission accounting orders for one of the telephone companies was somewhat larger. This citation indicates the FPC's unwillingness to consider what is "necessary or appropriate." In that case there were involved enormous interstate telephone companies with enormous properties. Moreover, the federal commission in that case was charged with the duty of regulating their rates. Contrast this situation with East Ohio. It is a relatively small company operating only in Ohio and has no rates to be regulated by the FPC. The sole effect of saddling it with a $1,500,000 to $2,000,000 expense will be to cause a rate increase to its Ohio consumers. Absolute dollar amounts as to the cost of compliance can, of course, not be compared without a complete comparison.

It was developed at the hearing and consistently urged by East Ohio, the State of Ohio, and the Ohio Commission that the expense sought to be imposed by the FPC on East Ohio had no value for any local rate regulation. For example, had East Ohio complied with the FPC's 1939 order to it as to inventories, original cost and operating expenses of its lines connecting with Hope, that data, in so far as it was not a complete duplication of the data which the Ohio Commission had, would under Ohio statutes have been of no value for Ohio rate making purposes (*supra*, p. 14).

Thus we submit that under all of the circumstances the orders which the FPC here seeks to impose upon East Ohio are neither "necessary or appropriate" for purposes of the "administration" of the Natural Gas Act.

B. THE FEDERAL POWER COMMISSION'S ORDERS HERE INVOLVED, IRRESPECTIVE OF STATUTORY AUTHORITY, VIOLATE FEDERAL CONSTITUTIONAL PRECEPTS.

1. Contrary to Article I, Section 8, and the Tenth Amendment, the orders seek to regulate intrastate commerce which in no way affects interstate commerce.

The federal constitution imposes certain limitations, apart from those of the Act, upon the FPC's doctrine of absolute administrative finality. The Constitution does not permit Congress or any agency created by it to order the production of information for its own sake. It has long been settled that the federal government has no general power of investigation. At least as early as *Kilbourn v. Thompson*, 103 U. S. 168 (1880), this Court held that Congress could not constitutionally compel the production of information in connection with an inquiry into the affairs of Jay Cooke & Co., which owed substantial debts to the United States. It said (103 U. S., 190):

> "* * * we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter in which that House has jurisdiction to inquire, and we feel equally sure that *neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.*" (Italics ours.)

Of course, where the production of information is necessary and relevant to the exercise of the power of regulation, or taxation, or for the purpose of securing information upon the basis of which to legislate, the federal government has the power to investigate necessarily implied in its specifically delegated powers, e.g. *Smith v. Interstate Commerce Commission*, 245 U. S. 33 (1917) (regulation); *Flint v. Stone Tracy Company*, 220 U. S. 107 (1911) (taxation); *McGrain v. Daugherty*, 273 U. S. 135 (1927) (legislation).

But it is equally clear that Congress is not "invested with 'general' power to inquire into private affairs and

compel disclosures * * *." *McGrain v. Daugherty, supra,* at 173-174. "An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means." *Jones v. Securities & Exchange Commission,* 298 U. S. 1, 25-26 (1936).

In the present East Ohio case it is apparent that the FPC orders are either for the purpose of disclosing facts as an end in themselves, which is not permitted, or to regulate intrastate commerce. We say *regulate* intrastate commerce because provisions for the control of accounting and other requirements are in themselves a "type of regulation" (*Electric Bond & Share Company v. Securities and Exchange Commission,* 303 U. S. 419 (1938)). Here the accounting and information requested are as to their great bulk with respect to properties used solely in the intrastate production and distribution of natural gas. It is all unrelated to any regulatory function which the FPC can or even claims it can perform as to East Ohio. In other words, this is not a case like *Interstate Commerce Commission v. Goodrich Transit Company,* 224 U. S. 194 (1912), upon which the FPC relies to support its claim of complete administrative finality as to the orders here involved.

The exercise by the FPC of its general powers, if any in these premises, in aid of intrastate regulation falls beyond the federal sphere of jurisdiction delineated by Article I, Section 8, and is an invasion of the powers reserved to the States by the Tenth Amendment.

2. Contrary to the Fourth and Fifth Amendments the orders under all of the circumstances constitute unreasonable searches and seizures and a taking of property without due process of law.

The constitutional provisions which protect East Ohio against the arbitrary federal administrative action here involved are the Fourth and Fifth Amendments.

In *Federal Trade Commission vs. American Tobacco Company*, 264 U. S. 298 (1924), the Federal Trade Commission sought to exercise its general statutory power to inspect documents and correspondence. The company resisted on the ground that the inspection was a mere fishing expedition and contrary to the Fourth Amendment which prohibits unreasonable searches and seizures. This Court through Mr. Justice Holmes sustained the company's position and pointed out that the Commission's general statutory authority must be construed as limited by the Fourth Amendment and exercised so as not to violate it. Concluding his opinion he said (264 U. S., 307):

> "We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408. *United States v. Jim Fuey Moy*, 241 U. S. 394, 401."

See *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292 (1937).

Even if authorized by statute, regulation involving an expense utterly disproportionate to the regulatory object to be accomplished is an unconstitutional deprivation of property.

In *Missouri Pacific Railway Company v. Nebraska*, 217 U. S. 196 (1910), this Court held that any administrative order which required a company to incur substantial expense was a taking of property. In that case a Nebraska statute required every railroad company to build a side track to any grain elevator of a certain capacity upon the written application of the operator. In the two cases before the Court the railroads had refused to comply with such written applications. Mr. Justice Holmes said (217 U. S., 205):

> "In the present cases, the initial cost is said to be $450 in one and $1732 in the other; and to require the company to incur this expense unquestionably does take

its property, whatever may be the speculations as to the ultimate return for the outlay."

State of Washington, ex rel. Oregon Railroad and Navigation Co. v. Fairchild, 224 U. S. 510 (1912), in which a State commission had ordered a track connection, recognized the settled principle that an order requiring expenditures by a public utility is not a "mere administrative regulation," but rather a "taking of property" (224 U. S. 523). Holding further that such a "taking of property" must be reasonably related to the purposes to be accomplished by the administrative order, this Court said (224 U. S., 533):

> "A careful examination of this record fails to show what, if any, business would be routed over these connections, or what saving would come to the public if they were constructed. There is nothing by which to compare the advantage to the public with the expense to the defendant and nothing to show that within the meaning of the law there is such public necessity as to justify an order taking property from the company. The judgment is therefore reversed without prejudice to the power of the Commission to institute new proceedings."

In the record now before this Court there is nothing indicating any reasonable necessity for the tremendous expense which would be imposed on East Ohio and ultimately upon the gas consumers of the State of Ohio. Indeed, as we have pointed out, the information sought by the FPC will be useless—both nationally and locally. An administrative order requiring an expenditure of close to $2,000,000 and achieving nothing in the public interest is, we submit, so arbitrary, unjust and unreasonable as to amount to a deprivation of property in violation of the Fifth Amendment.

Unable to find any proper interest to be served by the orders directed to East Ohio, the FPC has said simply that the estimated expense of $1,500,000 to $2,000,000 was in-

accurate. That estimate was made by East Ohio's President (R. 25), and the FPC did not even attempt cross examination on that point. The estimate is uncontradicted in the record. Yet the FPC in its final opinion stated that "our experience with other companies with greater property investment indicates that this estimate is considerably exaggerated" (R. 179).

The evidence which led the FPC to that conclusion does not appear in the record. East Ohio cannot know what it was, if any, or what similarity there may have been between the properties of East Ohio and these "other companies," or at what point in the changing price levels the expenses of the undisclosed "other companies" were incurred. Administrative decision on evidence never introduced and never subject to explanation or examination is itself a denial of procedural due process. *U. S. v. Abilene & Southern Railway*, 265 U. S. 274 (1924); *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292 (1937).

The FPC, now recognizing this inherent defect in its procedure in this case, has attempted to remedy the obvious deficiency in a footnote in its brief here (fn. 36, p. 79). A footnote in a brief before this Court is not the appropriate place to try a crucial issue of fact.

In the *American Telephone* case referred to above and cited by the FPC (Brief, pp. 71, 79-80) this Court considered whether the Federal Communications Commission could require the use of its uniform system of accounts which required a statement of original cost. It is to be observed that this Court commented on the expense involved as follows (299 U. S. 247):

> "Fourth: The evidence does not show that the expense of revising the accounts will lay so heavy a burden upon the companies as to overpass the bounds of reason."

In the present case the *evidence* shows beyond question that the expense involved in complying with the FPC orders in question is so large in relation to any legitimate purpose to be served "as to overpass the bounds of reason." Not only is the expense enormous in itself, but as we have seen, the data involved can serve no useful purpose whatsoever.

CONCLUSION.

For the reasons hereinbefore set forth we respectfully urge that the judgment of the court below be affirmed.

Respectfully submitted,

William B. Cockley,
Walter J. Milde,
Wm. A. Dougherty,
Attorneys for Respondent The East Ohio Gas Company.

C. W. Cooper,
Sturgis Warner,
Of Counsel.

November, 1949.

APPENDIX.

Natural Gas Act, As Amended.

[Public—No. 688—75th Congress]
[Chapter 556—3d Session]
[H. R. 6586]

AN ACT

To regulate the transportation and sale of natural gas in interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Sec. 2. When used in this act, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively.

* * * * *

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regu-

tions affecting or pertaining to such rates or charges, all be just and reasonable, and any such rate or charge at is not just and reasonable is hereby declared to be lawful.

(b) No natural-gas company shall, with respect to any ansportation or sale of natural gas subject to the jurisdicon of the Commission, (1) make or grant any undue eference or advantage to any person or subject any rson to any undue prejudice or disadvantage, or (2) aintain any unreasonable difference in rates, charges, rvice, facilities, or in any other respect, either as between calities or as between classes of service.

(c) Under such rules and regulations as the Commisson may prescribe, every natural-gas company shall file ith the Commission, within such time (not less than sixty ys from the date this act takes effect) and in such form the Commission may designate, and shall keep open in nvenient form and place for public inspection, schedules owing all rates and charges for any transportation or le subject to the jurisdiction of the Commission, and the assifications, practices, and regulations affecting such tes and charges, together with all contracts which in any anner affect or relate to such rates, charges, classificaons, and services.

(d) Unless the Commission otherwise orders, no ange shall be made by any natural-gas company in any ch rate, charge, classification, or service, or in any rule, gulation, or contract relating thereto, except after thirty ys' notice to the Commission and to the public. Such tice shall be given by filing with the Commission and eeping open for public inspection new schedules stating ainly the change or changes to be made in the schedule or hedules then in force and the time when the change or anges will go into effect. The Commission, for good use shown, may allow changes to take effect without reiring the thirty days' notice herein provided for by an

order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such

natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its

affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

ASCERTAINMENT OF COST OF PROPERTY

SEC. 6. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas

company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

[1] (c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extension thereof: *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for

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[1]This is paragraph (c) as originally enacted. It was then the concluding paragraph of Section 7.

certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.

(The foregoing paragraph (c) was amended and supplemented February 17, 1942 (56 Stat. 83) by substituting the following paragraph (c) and adding the following paragraphs (d), (e), (f) and (g) to Section 7):

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice of hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to

the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience, and necessity for service of an area already being served by another natural-gas company.

ACCOUNTS, RECORDS, AND MEMORANDA

SEC. 8. (a) Every natural-gas company shall make, keep and preserve for such periods, such accounts, records of cost accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this act: *Provided, however*, That nothing in this act shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-gas company may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by such natural-gas companies, and may classify such natural-gas companies and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays or receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commis-

ion shall be on the person making, authorizing, or requir-ng such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in sup-port thereof.

(b) The Commission shall at all time have access to and the right to inspect and examine all accounts, records, and memoranda of natural-gas companies; and it shall be he duty of such natural-gas companies to furnish to the Commission, within such reasonable time as the Commis-sion may order, any information with respect thereto which he Commission may by order require, including copies of naps, contracts, reports of engineers, and other data, records, and papers and to grant to all agents of the Com-nission free access to its property and its accounts, rec-ords, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge dur-ng the course of examination of books, records, data, or accounts, except insofar as he may be directed by the Com-nission or by a court.

(c) The books, accounts, memoranda, and records of any person who controls directly or indirectly a natural-gas company subject to the jurisdiction of the Commission and of any other company controlled by such person, in-sofar as they relate to transactions with or the business of such natural-gas company, shall be subject to examination on the order of the Commission.

RATES OF DEPRECIATION

SEC. 9. (a) The Commission may, after hearing, re-quire natural-gas companies to carry proper and adequate depreciation and amortization accounts in accordance with such rules, regulations, and forms of account as the Com-mission may prescribe. The Commission may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortiza-

tion of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas. Each natural-gas company shall conform its depreciation and amortization accounts to the rates so ascertained, determined, and fixed. No natural-gas company subject to the jurisdiction of the Commission shall charge to operating expenses any depreciation or amortization charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation or amortization other than that prescribed therefor by the Commission. No such natural-gas company shall in any case include in any form under its operating or other expenses any depreciation, amortization, or other charge or expenditure included elsewhere as a depreciation or amortization charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any natural-gas company, the percentage rates of depreciation or amortization to be allowed, as to any class of property of such natural-gas company, or the composite depreciation or amortization rate, for the purpose of determining rates or charges.

(b) The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation or amortization rates, shall notify each State commission having jurisdiction with respect to any natural-gas company involved and shall give reasonable opportunity to each such commission to present its views and shall receive and consider such views and recommendations.

PERIODIC AND SPECIAL REPORTS

SEC. 10. (a) Every natural-gas company shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate

assist the Commission in the proper administration of is act. The Commission may prescribe the manner and rm in which such reports shall be made, and require om such natural-gas companies specific answers to all iestions upon which the Commission may need informaon. The Commission may require that such reports shall clude, among other things, full information as to assets id liabilities, capitalization, investment and reduction iereof, gross receipts, interest due and paid, depreciation, nortization, and other reserves, cost of facilities, cost of aintenance and operation of facilities for the production, ansportation, or sale of natural gas, cost of renewal and placement of such facilities, transportation, delivery, use, id sale of natural gas. The Commission may require any ich natural-gas company to make adequate provision for irrently determining such costs and other facts. Such ports shall be made under oath unless the Commission herwise specifies.

(b) It shall be unlawful for any natural-gas company illfully to hinder, delay, or obstruct the making, filing, keeping of any information, document, report, memoindum, record, or account required to be made, filed, or ept under this act or any rule, regulation, or order thereider.

* * * * *

ADMINISTRATIVE POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

SEC. 16. The Commission shall have power to perform iy and all acts, and to prescribe, issue, make, amend, and scind such orders, rules, and regulations as it may find ecessary or appropriate to carry out the provisions of is act. Among other things, such rules and regulations ay define accounting, technical, and trade terms used in is act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed ith the Commission, the information which they shall con-

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Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE STATE OF OHIO AND THE PUBLIC UTILITIES COMMISSION OF OHIO.

HERBERT S. DUFFY,
Attorney General of Ohio,
KENNETH B. JOHNSTON,
Assistant Attorney General of Ohio,
Attorneys for Respondents the State of Ohio and The Public Utilities Commission of Ohio.

HAROLD L. MASON, *Chairman,*
HARRY M. MILLER, *Commissioner and Former Chairman,*
RAY O. MARTIN, *Commissioner,*
The Public Utilities Commission of Ohio,
Of Counsel.

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OPINIONS BELOW.

The opinion of the Federal Power Commission (R. 170-180), Petitioner herein, is reported at 74 PUR (NS) 256 (1947). The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 197-206) is reported at 173 F. 2d 429 (1949).

JURISDICTION.

The jurisdiction of this Court was invoked by Petitioner, hereafter called FPC, under Section 19(b) of the Natural Gas Act and under 28 U. S. C. 1254(1). This Court issued its order granting certiorari on June 20, 1949 (R. 210), *Federal Power Commission v. East Ohio Gas Co., et al.*, 337 U. S. 937 (1949).

QUESTIONS PRESENTED.

As in the court below, the FPC begins its argument for extending its own jurisdiction by referring only to the various East Ohio lines which bring home, from at or near the Ohio borders, East Ohio's out-of-state purchased gas. The basic question is not the effect of East Ohio's ownership and operation of these particular 650 miles[1] out of over 8,000 miles of lines in Ohio (R. 88) but, as the United States Court of Appeals for the District of Columbia Circuit said (R. 198):

> "The very heart of the instant controversy is the definition of the nature of East Ohio's business, petitioner and the intervenors [State of Ohio and The Public Utilities Commission of Ohio] claiming that East Ohio is solely engaged in the business of direct, local distribution of natural gas in the State of Ohio, and respondent [FPC] claiming that petitioner is in the business of transporting gas in interstate commerce. * * *"

The questions vital to the State of Ohio and the Ohio Commission which are actually before this Court are:

(1) Whether the court below was correct in holding (R. 202):

> "Moreover, the [Natural Gas] Act, in Section 1(b), *supra*, expressly states that it shall *not* apply 'to any other transportation or sale of natural gas or the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.' Not only does East Ohio produce or gather natural gas, but it strongly urges, and we believe the previously discussed facts clearly demonstrate, that it is engaged *solely* in the local distribution of natural gas to local consumers. *All* of its property,

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[1] These are multiple lines of about 100 miles. The longest is from the Cleveland-Akron area to Maumee, near Toledo, Ohio—about 114 miles (Ex. 4 (Map), Tr. Vol. I, p. 108A, R. 91; FPC Brief, p. 34, fn. 19).

including the 650 miles of high-pressure lines, is devoted to that sole purpose. Thus, once again, the very words of the Act exclude petitioner from its administration."

and (R. 204):

"All of the gas coming to East Ohio from out of state, gas furnished primarily by Hope and Panhandle, is already completely subject to federal regulation and comes to East Ohio at a rate set by the federal commission. There is thus obviously no gap in regulation in this case and the attempted assumption of jurisdiction by the federal commission in this instance, far from supplementing and reinforcing, constitutes unnecessary, undesirable and unintended usurpation of state regulatory authority which cannot be justified by either the terms of the Act or its legislative history."

(2) Whether—and this was not passed on below—the FPC orders here involved, and any provisions of the Natural Gas Act construed to authorize their issuance, constitute an invasion of the powers reserved to the State of Ohio under the Tenth Amendment to the Constitution of the United States and an invalid extension of the powers delegated to the federal government by Article I, Section 8, thereof.

STATUTE INVOLVED.

What is involved is the proper extent of the federal jurisdiction of the FPC under the Natural Gas Act of 1938 (Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by Act of February 7, 1942, c. 49, 56 Stat. 83, 15 U. S. C. 717 *et seq.*). Copies of this Act accompany the FPC's brief. For the convenience of the Court we submit with this brief a printed pamphlet setting forth the Laws of the State of Ohio administered by The Public Utilities Commission of Ohio.

STATEMENT.

It was with considerable surprise that the Ohio Commission learned that late in 1938 the City of Cleveland, which was then before it in a rate litigation with East Ohio, had requested the FPC to subject East Ohio to FPC jurisdiction and to investigate and determine a part of the costs of gas service in Cleveland, all of which the Ohio Commission was then investigating and determining (R. 100-101).[2]

The Ohio Commission did not then and does not now need federal assistance in investigating and determining East Ohio's expenses in moving its gas from the Ohio River to Cleveland. On January 10 and 20, 1939, the Ohio Commission concluded this pending rate litigation, determined all necessary costs and fixed a schedule for East Ohio's rates in Cleveland. *Re East Ohio Gas Company v. City of Cleveland*, 27 PUR (NS) 387 (1939). Its decision was subsequently affirmed by the Supreme Court of Ohio. *The East Ohio Gas Co. v. Public Utilities Commission of Ohio, City of Cleveland v. Public Utilities Commission (Two Cases)*, 137 Ohio St. 225, 28 N. E. 2d 599 (1940). Nevertheless on February 14, 1939, the FPC *ex parte*, without notice to the State of Ohio or the Ohio Commission and without any hearing, determined East Ohio to be a "natural-gas company" under the Natural Gas Act and subject to FPC jurisdiction. It ordered East Ohio to file an inventory of its lines and facilities from Cleveland to the Ohio River, a statement of their original cost, and 1936, 1937 and 1938 operating expenses pertaining thereto, as well as certain other information (R. 100-103).

In East Ohio's petition to the United States Circuit Court of Appeals for the Sixth Circuit for review of this unnecessary FPC action (*East Ohio Gas Co. v. Federal Power Commission*, 115 F. 2d 385 (1940)) the State of

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[2] See *East Ohio Gas Co. v. The Federal Power Commission*, 115 F. 2d 385, 386 (C. C. A. 6th 1940).

Ohio and the Ohio commission filed a brief *amicus curiae* pointing out that the plain intent of Congress in the Natural Gas Act was to occupy the field of interstate wholesale service in which this Court had held that the States may not act, and not to disturb the States in the exercise of their traditional jurisdiction over local retail gas companies. Ohio and the Ohio Commission there pointed out as to this summary assertion of FPC jurisdiction, and here reassert:

> "This is nothing less than the opening wedge in a thinly veiled effort to take over the regulatory jurisdiction and functions of both your orators."

The FPC thereupon claimed that its orders against East Ohio were not reviewable orders, and the court so held. (*Id.*, p. 389.)

We say advisedly that this attempt by the FPC to subject East Ohio to its jurisdiction was surprising. The Ohio Commission with other State public utilities commissions through the National Association of Railroad and Utilities Commissioners (NARUC) had participated in the framing of the Natural Gas Act.[4] Mr. John E. Benton, then General Solicitor of the NARUC, testified frequently on the various bills that ultimately became the Natural Gas Act. Throughout the various drafts he kept attention focused on the real objective of this legislation. For example: "We ask to have amendments adopted to this bill which will make it clear that Congress intends to regulate the wholesale interstate transactions and nothing else, and we think that will cover the entire field." (Hearings on H. R. 5423, 74th Cong., 1st Sess., at 1639.) It was accordingly well understood at the time of the passage of the Natural Gas Act,

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[4] Dozier A. DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and The Natural Gas Act of 1938*, 14 Geo. Wash. L. Rev. 30, 39 (1945).

as this Court has since frequently stated,[5] that the Act was ultimately drawn so as to take no authority from State commissions and so as to complement and in no manner usurp State regulatory authority.

Nothing further developed, except that in 1942, during the pendency of another East Ohio rate proceeding before the Ohio Commission (*The East Ohio Gas Co. v. City of Cleveland*, 56 PUR (NS) 73 (1944)), Cleveland and two adjoining suburbs again requested FPC intervention (R. 114, 109, 119).

Not until February of 1946 did the FPC move actively again (R. 129-136), although Judge Simons of the Sixth Circuit had suggested in 1940 that if so minded the FPC, pursuant to Sections 20 and 22 of the Natural Gas Act, could bring a federal district court action against East Ohio to enforce its orders (115 F. 2d, 389). We surmise that the FPC hesitated to have the jurisdictional facts determined independently by a federal court and preferred a procedure whereby it could make a finding of facts in support of its own jurisdiction and orders.[6] By 1946 the theory of federal jurisdiction asserted by the FPC against the regulatory authority of the State of Ohio and the Ohio Commission and against East Ohio had become known as the "stub line" theory. It was generally recognized that this theory would subject to FPC jurisdiction all natural and mixed gas distributing companies throughout the nation whenever they connected their distribution

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[5] *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498 (1942); *Public Utilities Commission v. United Fuel Gas Co.*, 317 U. S. 456, 467 (1943); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 609 (1944); *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, 517-518 (1947).

[6] Note the claims based on this strategy in the FPC brief here, pp. 17 (last sentence), 58, 76, 80.

systems "to an interstate pipe line for the purpose of receiving gas from the pipe line company."[7]

Ohio promptly intervened in this 1946 revival of the FPC's 1939 proceedings and has since actively participated as a party both before the FPC and the United States Court of Appeals for the District of Columbia Circuit (R. 163-169, 188-195, 201).

Thus Ohio and the Ohio Commission have from the beginning vigorously denied that East Ohio or, for that matter, any company conducting only a local distributing utility service solely within the confines of the State of Ohio, is a "natural-gas company" which Congress intended or decreed should be subject to federal regulatory jurisdiction under the Natural Gas Act. The reason for this position is obvious and was well summarized by the court below as follows (R. 199):

> "The Ohio Commission was created in 1911. Ever since that date it has repeatedly and continuously exercised its regulatory powers over all the business activities and property of petitioner. This regulation has included the setting of numerous rates, the supervision of acquisitions and sale of property and security issues, the control of accounting practices, inauguration and termination of service, examining service complaints, and requiring the submission of detailed reports to the Ohio Commission. Abundant state statutory authority exists for this regulation by the Ohio Commission and the state regulation authorized is mandatory, not permissive. As of the time of the hearings before the Commission in this case there had been a total of 258 formal regulatory proceedings before the Ohio Commission involving East Ohio. There can be little doubt that petitioner is now and has been very thoroughly and completely regulated by the Ohio Commission."

[7] Wheat, "The 'stub line' problem" in *Administration by the Federal Power Commission of the Certificate Provisions of the Natural Gas Act*, 14 Geo. Wash. L. Rev. 194, 207-208 (1945).

We observe that in its attempt to invade and duplicate this long established Ohio jurisdiction and regulation the FPC in its so-called "Statement" stresses the single fact that there is an interstate movement[8] in the lines by which East Ohio brings home gas purchased from interstate companies to the streets of the great populated areas of northeastern Ohio which it serves. There is only a bare mention of the fact that East Ohio sells no gas for resale.

The facts are that East Ohio's sole business is the local distribution of gas in Ohio and all of its property is used solely and exclusively for that purpose (R. 25-28). Its property, its gas purchases and sales, its gas receipts and deliveries, are all in Ohio (R. 13, 25). If its distribution business were terminated it would have no use whatever for any of its property (R. 25). It is not ~~a so-called~~ "pipeline company" and does not transport natural gas for hire (R. 23). *Every foot of gas that enters the East Ohio system is either produced or purchased by it from independent producers in Ohio* (R. 89) *or purchased by it in Ohio from Hope Natural Gas Company or Panhandle Eastern Pipe Line Company at rates fixed by the FPC* (R. 89, 17-22); and every foot of this gas has one purpose, and only one purpose, in the East Ohio operation—local distribution for domestic, commercial and industrial use.

The center of East Ohio's local distribution to its 551,000 consumers in 69 northeastern Ohio municipalities with a population of over 2,000,000 is at its so-called Gross Farm Station located south of Cleveland and Akron, north of Canton and Massillon, and west of Youngstown and Warren (Map, R. 91). At Gross Farm Station the gas

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[8] The FPC Brief mistakes Ohio's position below (p. 24, fn. 12; p. 33). There is technically an interstate movement of gas in East Ohio's lines but East Ohio is not engaged in the business of interstate transportation—it transports no gas for others for hire and no gas destined for sale at wholesale—which was intended to be subjected to FPC jurisdiction. The only business of East Ohio is intrastate commerce, local retail sales.

is or can be controlled for all parts of the system, for it is there that most of the local and out-of-state gas is converged either for immediate distribution or for storage in large underground storage areas which were developed for that purpose from former Ohio producing wells. At Gross Farm Station there are many pipe lines operating under various pressures, valve stations, regulator stations, compressing stations, etc. From this point gas is distributed in all directions depending on the needs at the particular time both up and down the lines. At other times, depending on the need of the flow of gas, out-of-state gas goes directly to distributing areas in Cleveland and other large cities in the territory without additional pumping from Gross Farm Station (R. 22-23, 36-37, 58-59).

Except that it distributes gas to 69 Ohio communities rather than to a lesser number, and that its "stub lines" to its interstate sellers are somewhat longer than most other Ohio retail distributing companies, East Ohio's business and operations are exactly like those of all of the other local Ohio retail distributing companies.

There operate in Ohio, or into Ohio, some 66 companies handling natural gas.[9] Of these, 14 are companies transporting gas from out of Ohio and wholesaling it in Ohio (and of course subject to the jurisdiction of the FPC as "natural-gas companies"),[10] like Panhandle Eastern Pipe Line Company, Tennessee Gas Transmission Company, Texas Eastern Transmission Company and United Fuel Gas Company.[11] A few retail only Ohio produced gas, but

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[9] Federal Power Commission, Directory of Electric and Gas Utilities in the United States 338-363 (1948).

[10] Federal Power Commission, Statistics of Natural Gas Companies 506 (1947).

[11] One or two of these wholesaling "natural-gas" companies also engage directly in local distribution in Ohio, a situation which makes considerable duplicate jurisdiction and regulation unavoidable. To avoid confusion, conflict and expense to consumers in these cases the Ohio Commission must substantially abdicate in favor of the FPC.

the remaining 40 companies supplement their local supply with gas purchased from interstate wholesale companies. All of these necessarily have "stub lines" of some length connecting with their sources of out-of-state gas.[12]

Except for a few rural and small-town areas served with purely Ohio produced gas, *it is apparent that the effect of approval by this Court of the FPC's "stub line" theory would be to subject substantially all of the natural gas distributing companies in Ohio to the jurisdiction of the FPC.* From the standpoint of a State commission, with years of practical day-to-day regulatory experience, such a position as the FPC here asserts is unwarranted. The FPC's theory that once out-of-state gas is injected into and carried in the pipe line system of a purely local intrastate company distributing gas at retail such a company develops a national interest which subjects it to federal regulation, will place an undue burden on practically every gas company, large or small, in the State of Ohio and on their Ohio consumers. This is exactly what Congress did not intend and exactly what the Natural Gas Act clearly says will not be the case, as we later point out.

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[12] See the "Transmission Line" lengths reported in the Federal Power Commission's Directory, *supra*, note 9.

ARGUMENT.

I. THE JURISDICTIONAL PROVISIONS OF THE NATURAL GAS ACT EXCLUDE FEDERAL POWER COMMISSION JURISDICTION AND PRESERVE OHIO'S JURISDICTION OVER EAST OHIO.

A. Section 1 of the Act Defines the Limits of FPC Jurisdiction and by its Terms Excludes FPC Jurisdiction over East Ohio.

We need not labor the point that the Natural Gas Act was not intended to extend the jurisdiction of the FPC to the limit of federal constitutional power over the natural gas industry. Accordingly limitations on its jurisdiction, so that it would function to complement that of the State regulatory bodies, were expressed in Section 1 of the Act and particularly in Section 1(b). This Court has several times said just that. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, 516 (1947); *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 502-503 (1949).

Section 1 of the Act (52 Stat. 821 (1938), as amended, 56 Stat. 83 (1942), 15 U. S. C. 717, *et seq.*) reads as follows:

> "Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.
>
> "(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale,

but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." (Italics ours)

1. Even to one not familiar with the history of the Act it is obvious that the most specific of the words in Section 1(b) are those which exclude from the operations of the Act "the local distribution of natural gas" and "the facilities used for such distribution." The only other words almost as specific are "the sale in interstate commerce of natural gas for resale for ultimate public consumption." The words "transportation of natural gas in interstate commerce" are most general and resort must be had, as in the FPC's brief here (pp. 33-42), to the decisions of this Court as to the probable meaning of these general words. On ordinary rules of statutory construction the more specific governs the more general.[13]

There can, for example, be no doubt that these specific words as a matter of ordinary statutory construction mean that a local distributing company operating in a town straddling the Ohio-Pennsylvania or Ohio-Indiana border is exempt from the jurisdiction of the FPC under the Natural Gas Act, although cases will support the proposition that the passage of gas on a street main from Pennsylvania or Indiana to Ohio or vice versa constitutes transportation in interstate commerce.

It is equally obvious, and the record here abundantly shows, as the court below found, that East Ohio is engaged in the local distribution of natural gas solely in Ohio and that its so-called transmission lines as well as all of its other facilities by which it handles gas once it is produced, gathered or purchased are "facilities used for such distribution." Some of these facilities, the FPC claims, are

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[13] *McEvoy v. United States*, 322 U. S. 102 (1944).

used to move gas in interstate commerce as the cases have defined such movement. Even so, that use is solely for local distribution, as in the case of a town straddling a State line, and therefore cannot alter their character as facilities used for local distribution.[14]

The only argument the FPC brief makes (pp. 17, 54-55) against the simple application of the plain words of Section 1(b) is to say that practically all facilities in the natural gas industry have local distribution or sales to industrials "as their ultimate purpose," and that under the decision below the Natural Gas Act would be largely ineffective. This is nonsense. The Natural Gas Act was not framed to confer jurisdiction on the FPC over natural gas as such, but for the practical purpose of having the FPC regulate the rates and other practices of interstate wholesaling and pipe line companies handling that gas.

No interstate wholesaling or pipe line company, such as the Act intended to regulate federally, can say that its facilities are used for local distribution when its facilities are used by such company for the resale of gas for ultimate public consumption or to transport the gas of others for hire. Such interstate companies are themselves not engaged in local distribution and could not claim that they use their facilities for that purpose. On the other hand, in the case of East Ohio and the hundreds of local distributing companies like it that connect by "stub lines" with interstate pipe lines, their business is that of local distribution and all of their facilities, including these "stub lines," are obviously used for that immediate purpose.

2. It is not only true that East Ohio's operations and facilities are specifically excluded from the operations of the Natural Gas Act by the *specific* words of Section 1(b), but it is also true that any rational consideration of the

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[14] Such transportation purely incidental to local distribution, as is East Ohio's, obviously falls within "other transportation" as these words are used in Section 1(b).

general words in that section fail to include East Ohio under FPC jurisdiction.

The general words "transportation of natural gas in interstate commerce" and "engaged in such transportation" and the words "natural-gas companies engaged in such transportation" necessarily require some construction. The definitions in Section 2 are of no help. Section 2(7) merely repeats the usual federal statutory definition of interstate commerce and Section 2(6) merely includes the word "person" in the term "natural-gas companies." Literally, a railroad carrying a cylinder of natural gas for testing at a laboratory across a State line, or a technician carrying such a cylinder across a State line in his automobile, are each transporting gas in interstate commerce. So is a farmer with a well in Indiana and his house and barn where he uses the gas in Ohio. So is an industrial plant with its wells on one side of the state line and its glass-making or other facilities where the gas is used on the other side. So is a steel mill or glass plant which runs its own line for some miles to tap into an interstate pipe line. Yet obviously none of these persons were intended to be covered by these general words in the Act.

We say "obviously" because the key to the meaning of these *general* words appears in Section 1(a) where it is stated that "the *business* of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest" (Italics ours). The "business" of transporting obviously refers to a public utility business—a job done for others and repeatedly and for hire. So interpreted, the general words "transportation of natural gas in interstate commerce" in Section 1(b) suddenly make great sense and dissipate all of the confusion and overlapping of federal and State jurisdiction which follow from the FPC's "stub line" theory as here urged.

The purely retail distributing companies in various States, such as East Ohio and many others in Ohio, are

not carriers for hire of either local or interstate gas. They build lines within the State solely to bring gas which they have produced or purchased at wholesale to their consumers' meters at retail. They are all, and all their facilities are, subject to complete State regulation because their operations are essentially of local and not national concern.[15] There is no rate or service which they charge or perform for others in connection with any "interstate transportation" and there is therefore nothing which requires federal regulation because the State cannot regulate.

It seems to us more than plain that any proper application of the specific exclusionary words of Section 1(b), and any common sense consideration of its general words, inevitably results in the conclusion that the "stub line"

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[15] We find the FPC a little less than frank in arguing (Brief, p. 52): "Under the *East Ohio v. Tax Commission* case read in conjunction with the *Attleboro* case the Ohio Commission was without power constitutionally to regulate these [pipeline] activities of East Ohio." The *Attleboro* case involved a *sale in interstate commerce for resale* and the interests of consumers in two States were involved. It has always been true that where the local interest overbalances the necessity for national uniformity, States may regulate even interstate commerce in the absence of Congressional regulation. (*Cooley v. Wardens*, 12 How. 299 (1851)). In the case of East Ohio the only interests whatsoever are local and affect consumers in only one State. The further FPC argument (Brief, pp. 23-24, 31) that "East Ohio, for reasons best known to it, has acquiesced in the Ohio Commission's assertion and exercise" of its complete jurisdiction is indeed extraordinary. The reason for East Ohio's so-called acquiescence is the doctrine recently stated by this Court in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, 523 (1947); to-wit: State power to regulate interstate commerce in the absence of Congressional occupation of the field is "the power to require that it be done on terms reasonably related to the necessity for protecting the local interests on which the power rests.".

It is not unimportant that all natural gas distributing companies throughout the country "acquiesced" in State regulation of their "stub lines." Litigation in the natural gas field has been prolific, and no one that we know of has ever asserted as against State power the claims made by the FPC here.

theory and its application to East Ohio are wholly unsound. It is equally obvious that this represents an attempt by the FPC, through intricate arguments, to expand its federal jurisdiction and encroach upon—and well nigh annihilate—State regulation of local distributing companies. In its petition for a writ of certiorari here the FPC revealed the great reach of its "stub line" theory. There it said (p. 19):

> "There are now pending before the Commission 43 similar cases which involve, as here, transportation in interstate commerce wholly within a single state."

If all of these cases involve, as does this case, simply transportation by "stub lines" for local distribution and not transportation for others, it is obvious that the FPC's bid for power illustrated here and in these 43 pending cases should be stopped once and for all by applying here the plain intent and obvious meaning of Section 1 of the Act.

B. The Legislative History of the Natural Gas Act Shows That the FPC Was Not to Have Jurisdiction over Local Distributing Companies Like East Ohio and the States Were to Retain Their Former Jurisdiction.

This Court in other cases has so thoroughly reviewed the legislative history[16] of the Natural Gas Act that we need not go into that history in detail. We do point out that as a result of this analysis this Court has concluded

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[16] Hearings on H. R. 5423 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., early in 1935; Hearings on H. R. 11662 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess., in April, 1936; and Hearings on H. R. 4008 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., in March 193[illegible]. H. R. 4008 was reported out as H. R. 6586 and was accompanied by House Report No. 709, 75th Cong., 1st Sess. The FPC (Brief fn. 12, p. 24) has pointed out that all of these hearings are relevant in determining the Congressional intention in the enactment of the Natural Gas Act.

(*Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, 517 (1947)):

> "The Act, though extending federal regulation had no purpose or effect to cut down state power. On the contrary, ~~perhaps its~~ primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions."

This gap, of course, was obvious to all those interested in this new federal legislation—the "impotence of the states to act in relation to sales for resale by interstate carriers" (332 U. S., 516) and the similar impotence with respect to interstate transportation charges by interstate carriers of gas. As we have heretofore noted, the State commissions, represented by the NARUC, were most anxious that this gap be filled. At the same time they recognized that in the process of drafting legislation vigilance would have to be used to see that language was employed which would be appropriate only to fill the gap and not to cut down existing State powers. This Court has already referred to this participation by the State commissions (332 U. S., 518-519, fn. 14).

We accordingly supplement what this Court has heretofore noted with respect to the legislative history with the following additional items which all serve to reinforce the views heretofore expressed:

1. Both in the hearings on H. R. 11162 and H. R. 4008, Mr. Benton, solicitor for the NARUC, presented an NARUC resolution supporting the purpose of the bill and in connection therewith stating "that Congress be asked to limit the jurisdiction granted strictly to gas transmitted and sold wholesale for resale and that such legislation be so drawn as in no way to limit or impair the power of the states to regulate intrastate and local service. * * *" (Hearings on H. R. 11662, p. 85; Hearings on H. R. 4008, p. 22.)

2. In the hearings on H. R. 11662, Representative Cooper began to ask Mr. DeVane, the FPC solicitor, some questions about Section 7(a) and its effect; but the questions were brushed aside and Mr. DeVane explained that the real purpose of the Act and the purpose which should be considered by the Committee was the regulation of interstate wholesale service:

> "MR. DEVANE. Yes; but that is not your real problem, Mr. Cooper. The real question we are dealing with here is: there is a complete hiatus in the regulation of rates charged by these pipe-line companies to the local distributors of gas throughout the United States, and we are trying to augment State regulation by conferring authority upon a Federal agency to fix those rates." (Hearings on H. R. 11662, p. 41.)

3. Mr. Benton told the Committee that it was his understanding that the draftsmen of the bill had intended to regulate only interstate wholesale service:

> "* * * Now, as I have said, the purpose of those who drew this bill undoubtedly was to preserve the field of local regulation to the State authorities. Federal regulation is aimed to be imposed only upon the companies which sell gas in interstate commerce to other companies for ultimate resale to the public, and upon those companies only to the extent of their transportation and sale in interstate commerce to such other companies.
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> "Federal regulation is aimed to be imposed only upon those companies which sell gas in interstate commerce at wholesale. * * *." (Hearings on H. R. 11662, p. 90.)

4. When the bill had been redrafted as H. R. 4008 and was again considered in Committee, Representative Lea, the Chairman of the Committee and the man largely responsible for the Natural Gas Act, said that—"Of course, the purpose of this bill is to reach those sales where gas is transported across State lines for the purposes of resale. * * *." (Hearings on H. R. 4008, p. 105.)

After the close of the hearings, H. R. 4008 was changed slightly and was reported to the House as H. R. 6586. The debate on the bill was held on July 1, 1937. Representative Halleck, a member of the House Committee who had taken a very active part in the hearings, stated that he wanted to "add a few words which may explain the purposes [of the bill] a little more clearly to the membership of the House." (81 Cong. Rec. 6723 (1937.)) He explained that a gap had previously existed in the interstate sale of gas, that this regulatory gap had greatly hampered the State commissions, and that the bill sought to regulate interstate wholesale prices. He also discussed the regulation of transportation and pointed out that though control over the distributing companies had been effective, adequate consumer rate regulation was greatly hampered by the fact that "in many instances the transportation company, transporting in interstate commerce, has charged a rate which is higher than is deemed fair and reasonable." *Ibid.*

5. Mr. Benton for the NARUC believed that the job which had been undertaken, namely to fill the gap as to interstate wholesale service and at the same time to preserve all existing State powers over local companies, had been accomplished. After the hearing on H. R. 4008 Mr. Benton wrote to Representative Lea stating that a joint meeting of the NARUC Executive Committee and its Committee on Legislation had been held and that at this joint meeting the committees had considered whether or not H. R. 4008 "will provide regulation of the character requested in the resolution heretofore adopted by this association, and presented at the hearing on March 24, 1946." Mr. Benton concluded: "A resolution was unanimously adopted endorsing H. R. 4008 amended as requested on behalf of this association at the hearing on March 24." (Hearings on H. R. 4008, p. 141.) The requested amendments (*Id.*, pp. 21-22) were all adopted.

If the FPC is right in its brief here, all of these participants in the drafting of the Act and the NARUC and its representatives were deluded.

If the FPC is right here, the Natural Gas Act did not fill a gap, did not preserve the existing State jurisdiction over retail distributing companies, but actually set up another Interstate Commerce Commission type of regulation which reaches into intrastate commerce and State regulation to such an extent that the jurisdiction and activities of State commissions in respect of railroads are now largely perfunctory. We point out that never once did Mr. DeVane, the solicitor for the FPC, indicate that this is what the FPC had in mind at the time. What he should have been saying to the Congressional Committees if he then really thought that the Natural Gas Act could be interpreted to subject practically all the natural gas distributing companies in the United States to FPC jurisdiction was just exactly that; and he never did. Nor did any one else. The "stub line" theory has reared its head since that time.

Now what has the FPC brief to say about this legislative history? It offers "materials from the Act's legislative history" (Brief, p. 31). These "materials" are designed to show that whatever Congress intended generally by the Act, "East Ohio in particular was intended to be covered by it" (Brief, p. 20). The FPC's "materials" lend not the slightest support to this claim:

1. The FPC (Brief, pp. 29-30) calls attention, as if significant, to the fact that the Federal Trade Commission reviewed East Ohio's activities pursuant to Senate Resolution 83 (70th Cong., 1st Sess.) which is referred to in Section 1(a) of the Natural Gas Act. The fact is that the Federal Trade Commission reviewed the activities of 121 natural gas holding and operating companies of which East Ohio was only one (Sen. Doc. 92, 70th Cong., 1st Sess., Part 84-C, App. E-2). Moreover, what the Federal Trade Commission had to say about East Ohio's operations was this:

> "All its operations are under the supervision and regulation of the Ohio Public Utilities Commission in addition to the important rights of the cities to negotiate rate franchise agreements directly with the utility." (*Id.*, Part 84-A, p. 560).

We suggest that if these Federal Trade Commission reports are to be incorporated by reference into the Natural Gas Act the foregoing demonstrates that East Ohio was not one of the companies to be covered by a federal regulatory act designed to preserve existing State power.

2. The balance of the legislative "materials" offered by the FPC consists of some nine pages (Brief, pp. 21-29) pointing out with great elaboration that *East Ohio Gas Co. v. Tax Commission of Ohio*, 283 U. S. 465 (1931), was referred to at various times in briefs and discussions. In particular, attention is called to the fact that Mr. DeVane, the FPC solicitor, had presented a brief supporting the constitutionality of the proposed legislation. Mr. DeVane's brief on H. R. 11662 is printed in the report of the Hearings on H. R. 11662 at pages 12-24 and, as the record shows, was placed before each member of the Committee, but nothing further was done about it (*Id.*, p. 12). Mr. DeVane of course cited the *East Ohio v. Tax Commission* case as any one would who was discussing the natural gas cases that had come before this Court.[17]

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[17] The FPC (B., p. 25) points to four citations of the case. The nature of those citations is interesting. (1) "Similarly, the interstate transportation of gas from one State to another has been held to be interstate commerce." (Hearings on H. R. 11662, p. 13.) Four cases are cited, of which the East Ohio tax case was one. (2) "The regulatory power of the Congress over the transportation of natural gas from within the borders of a State to another State is conclusively established by the following authority:" (*Id.*, p. 14) Seven cases are cited of which the East Ohio tax case is one. (3) The facts of the East Ohio tax case were stated (*Id.*, p. 16) as were the facts of the other six cases cited for the proposition that Congress can regulate interstate commerce. There was no comment directed specifically to the East Ohio case. (4) "With respect to the distinction between the transportation of natural gas and high pressure mains and the distribution of such gas locally in low pressure mains, and the power to regulate the former activities, see * * *" (*Id.*, p. 17). The East Ohio tax case is one of six cases cited; and no particular comment was made on East Ohio.

Certainly regulation of substantially all of the distributing companies in the State of Ohio cannot rest on such flimsy and insubstantial evidence of Congressional intention.

What the FPC does not point out is that Mr. DeVane cited some 80 cases of which some 20 involved natural or mixed gas companies. When he adverted to the language of H. R. 11662, he said (*Id.*, p. 16): "Moreover, the regulation of retail rates and *matters incident to local distribution* have been reserved by H. R. 11662 to the States." (Italics ours.)

Hereinbefore in these proceedings the FPC has made a great point of characterizing the plain common-sense viewpoint that the connecting lines of local distributing companies are merely incidental to local distribution as an invention of the local distributing companies and the State commissions to block intended federal regulation. We note that it was Mr. DeVane who first pointed out that "matters incident to local distribution" were not to be regulated by the Natural Gas Act.

3. In the course of its discussion of citations of the *East Ohio v. Tax Commission* case the FPC (Brief, pp. 27-29) makes a special argument about certain amendments which Mr. Benton of the NARUC had recommended in connection with H. R. 5423, which amendments by their terms excluded local distributing companies like East Ohio. Then, the FPC argues (Brief, p. 29), these amendments were not adopted. The facts are these:

The jurisdictional provisions in H. R. 5423 differed radically from the corresponding sections in H. R. 11662 and H. R. 4008 which gave the FPC control over a very limited segment of the natural gas industry. The method used in Title III of H. R. 5423 is that which now appears in Section 201(e) of the Federal Power Act (originally Title II of H. R. 5423) which reads as follows (15 USC, Sec. 201(e)):

> "(e) The term 'public utility' when used in this Part or in the Part next following means any 'person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.'"

In the proposed Section 301(b) in Title III of H. R. 5423 it was provided among other things: "Every person who owns or operates facilities subject to the jurisdiction of the Commission under this Title shall be subject to the provisions of this Title." The facilities which were to be subjected to the jurisdiction of the FPC included not only those used for interstate transmission or sale of gas but also (*Ibid.*) "* * * all facilities connected therewith as parts of a system of natural gas transmission situated in more than one state, except facilities for the retail distribution of natural gas, * * *."

This definition quite obviously went so far that any sizable company engaged in the local distribution of gas would have been subject to FPC jurisdiction. Accordingly it was essential for the NARUC to insist upon such an amendment in order to limit federal jurisdiction in a manner which the NARUC considered absolutely indispensable.[18] Mr. Benton therefore suggested amendments to exempt local distributing companies, such as East Ohio, from becoming subject to FPC jurisdiction merely because they had or connected with some facilities which might fall within the broad language of the proposed Section 301(b) of H. R. 5423.

When H. R. 6586 which became the Natural Gas Act was drafted this prior method which had been used in the 1935 Act was not used. Instead the present language of Section 1(b) of the Natural Gas Act was framed which makes the provisions of the Act apply to certain businesses rather than have jurisdiction of the FPC attach because a

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[18] Mr. Benton in beginning his statement in the Hearings on H. R. 5423 had explained that the NARUC had seen previous federal legislation gradually grow and encroach upon the wholly adequate regulation conducted by the several State commissions. He stated that the NARUC wanted federal regulation of interstate wholesale service and that it did not and could not approve federal regulation which extended beyond interstate wholesale service. (Hearings on H. R. 5423, pp. 1624 *et seq.*)

gas company might own one or more particular *facilities*. It provides, as we have seen, that the provisions of the Act shall not apply to the "local distribution of natural gas or to the facilities used for such distribution."

4. There is some legislative "material" actually dealing with East Ohio, but this the FPC's brief omits.

When H. R. 4008 was being considered in committee, Mr. Justice Burton, then Mayor of Cleveland, appeared on behalf of the City of Cleveland, the single largest community served by East Ohio. He testified at some length before the Committee and made specific references to the situation existing in the City of Cleveland and its relations with East Ohio and Hope. (Hearings on H. R. 4008, pp. 48-52.) There is absolutely no indication of any kind in Mayor Burton's testimony that he desired any federal regulation of East Ohio. He explained to the committee that the Ohio Commission had been investigating the Cleveland rates and stated specifically that they were "getting all of the facts in Ohio." (*Id.*, p. 50.)

Mayor Burton explained that the only trouble that Cleveland had with its gas situation was in the determination of the proper price which East Ohio should pay for the gas which it bought from Hope and that the entire situation could be handled perfectly satisfactorily if the price to be paid to Hope were subjected to federal regulation.

Also William C. Reed, Chairman of the Public Utilities Committee of the Cleveland Council, appeared before the Committee considering H. R. 4008. He too testified at considerable length and with specific reference to East Ohio. (Hearings on H. R. 4008, pp. 87-95.) Nowhere in his testimony did he suggest any necessity for regulating East Ohio. He made it clear to the Committee that the City of Cleveland was interested in regulation of wholesale service, a service which was performed by Hope and not East Ohio.

Thus the legislative history of the Natural Gas Act, and especially the portion dealing specifically with East Ohio, reaffirms what is obvious—that interstate wholesaling companies were to be federally regulated, and not retail distributing companies like East Ohio.

II. THE "STUB LINE" THEORY HERE ASSERTED BY THE FPC TO FASTEN ITS JURISDICTION ON EAST OHIO CREATES CONFLICT AND CONFUSION BETWEEN FEDERAL AND STATE REGULATION OF NATURAL GAS DISTRIBUTING COMPANIES AND WILL ULTIMATELY SUBSTITUTE FEDERAL REGULATION FOR STATE REGULATION.

A. Basing Federal Jurisdiction Solely on the Mechanical Movement of Natural Gas Necessarily Creates Confusion in Federal and State Regulation.

The mechanics of the natural gas industry are extremely simple. Gas lies underground and is tapped by wells. From inside these wells to the burner tips of the ultimate consumers there is a continuous pipe line of various sizes and when gas is being used by the ultimate consumers the gas moves continuously. If the so-called rock pressure at the bottom of the wells is sufficient, no aids to this continuous movement are necessary. If not, pumping stations are required to boost the pressure which gradually declines through line friction. Storage areas enroute, as recently developed in the gas industry, merely constitute a temporary resting place for this gas in this continuous movement.

Now it is obvious that if this continuous movement crosses any State line and the areas of federal and State jurisdiction are to be determined solely on gas mechanics, then there is federal jurisdiction, solely, from the bottom of the well to the consumer's burner tip. This same situation exists with respect to the continuous flow of electricity from generators in one State to the toasters on the break-

fast tables of another State, as this Court pointed out in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515, 529-530 (1945). It was this precise mechanical theory of exclusive federal jurisdiction that was urged upon this Court in *East Ohio Gas Co. v. Tax Commission of Ohio*, 283 U. S. 465 (1931). The concluding paragraph of the brief of appellant, East Ohio, in that case (No. 453 in the October Term, 1930) read as follows:

> "The fact is that if this movement is an interstate movement at the time it crosses the Ohio state boundary line, of which there is no dispute, there is no logical or practical place to assert a change in the character of that movement until it reaches the only destination intended for it, namely consumers' appliances. Fiction and not fact will control if it is held otherwise."

This Court, however, refused to accept the ultimate logic of the mechanical test. It suggested as a mechanical answer the doctrine of "breaking bulk" (283 U. S., 471), a doctrine which for a hundred years theretofore had not been applied in the field of State taxation of interstate commerce.[19] Its mechanical answer was not the real one, as it recently pointed out in the *Connecticut Light & Power* case. Referring to the *East Ohio v. Tax Commission* case and *Southern Natural Gas Corp. v. Alabama*, 301 U. S. 148 (1937), it said (324 U. S., 534):

> "In neither case was this Court required to determine the exact point at which interstate commerce ceased and intrastate commenced. It was required to find only some 'doing of business' within the state in order to sustain the constitutionality of the statutes involved. In both cases it upheld the power of the state to tax and in both held that the distribution at low pressure was a local business for taxation purposes

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[19] *Brown v. Maryland*, 12 Wheat. 419 (1827), gave the doctrine its initial formulation.

as distinguished from transmission in interstate commerce."

As we have seen both from the precise language of Section 1 of the Natural Gas Act and its legislative history, the mechanical test of interstate commerce was not the one applied. *"Production," "gathering," "local distribution" and "the facilities used for such distribution" are all words relating to a business function and operation rather than to the mechanical movement of the gas involved.*

The mechanistic theory of federal jurisdiction reflected in the FPC's "stub line" theory obviously does not make sense in light of the plain purpose of the Natural Gas Act to insert federal regulation in the State regulatory gap created by the prior decisions.

Instead of filling the gap this theory creates constant actual and potential conflict between federal and State regulatory jurisdiction. Who can say at what point in the continuous movement of gas from the bottom of natural gas wells to consumers' burner tips the interstate movement begins or ends as a matter of mechanics? The beginning, mechanically, is as hard to define as the end. In *Interstate Natural Gas Company, Inc. v. Federal Power Commission, et al.*, 331 U. S. 682 (1947), Mr. Chief Justice Vinson said at page 689:

> "Nor are we impressed with the suggestion that the interstate movement of the gas should be regarded as beginning when the gas, theretofore moving through petitioner's pipe line system at well pressure, is subjected to increased pressure in the compressor stations of the purchasing companies in order that the gas may be moved to the distant markets. Long before the gas reaches the compressor pumps it has been committed to its interstate journey which follows without interruption or deviation. Under such circumstances, the increase of pressure in the compressor stations must be regarded as merely an incident in the interstate commerce rather than as its origin."

In the *East Ohio v. Tax Commission* case Mr. Justice Butler, not doubting that delivery of gas at East Ohio's burner tips "is not interstate commerce but a business of local concern exclusively within the jurisdiction of the State" (283 U. S., 471), was not so clear as to where interstate commerce, as a matter of mechanics, ended. He indicated a possible line—"when the gas passes from the distribution lines [East Ohio's lines to the Ohio River] into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies" and this treatment "is like the breaking of an original package, after shipment in interstate commerce" (283 U. S., 470-471). However, as the Federal Power Commission points out in footnote 4 on page 7 of its brief, this breaking of the original package is a very gradual process. The fact is that there is a gradual reduction in the 300 pounds or so pressure at the Ohio River and at Maumee to the 4 to 6 ounce pressure at which consumers receive this gas. Does interstate commerce, mechanically, end somewhere along the main lines as pressure falls—and if so at what precise pressure? In the intermediate high pressure lines? Or where those lines connect with the numerous large low pressure mains which connect with the smaller lines in each street or lane?

Referring recently to the *East Ohio v. Tax Commission* case on this point this Court said in the *Connecticut Light & Power* case (324 U. S., 534):

> "But a holding that distributing gas at low pressure to consumers is a local business is not a holding that the process of reducing it from high to low pressure is not also part of such local business. In so far as the Commission found in these cases a rule of law which excluded from the business of local distribution the process of reducing energy from high to low voltage in subdividing it to serve ultimate consumers, the Commission has misread the decisions of this Court. No such rule of law has been laid down."

It would take many years of litigation to prick out any line of demarcation between federal and State control if that line is to be determined on gas mechanics. The conflict between the FPC and State commissions and local distributing companies on this point would be endless. Depending upon the shifting views of the members of the Federal Power Commission from time to time, they could either stay within the actual regulatory "gap" which their activities were to occupy, or seek to impose their various authorities upon every natural and mixed gas distributing company in the United States.

The latest example of course is the claim of the legal staff of the Federal Power Commission that Consolidated Edison Company of New York, Inc., The Brooklyn Union Gas Company and the Kings County Lighting Company, all artificial gas companies serving the enormous population of the City of New York, will be "natural-gas companies" subject to FPC jurisdiction because they propose to buy natural gas for mixing purposes from an interstate pipe line company at a delivery point in the City of New York and from there construct a 23 mile high pressure line within the City of New York to reach the several gas plants of these three large local distributing companies (FPC Docket Nos. G-1167, G-1171, G-1190).

These particular local companies have adequate resources to fight this assertion of FPC jurisdiction. However, a similar application of the mechanistic "stub line" theory to hundreds of local distributing companies throughout the nation may well find many of them unable to afford the long litigation necessary to challenge federal jurisdiction when the FPC asserts it as to them. Federal regulation will thus inevitably shove aside State regulation by encroachment and default.

B. The Mechanistic "Stub Line" Theory Applied to Give the FPC Jurisdiction over East Ohio Creates Numerous Conflicts with Ohio's Regulatory Jurisdiction over East Ohio.

A glaring example of the conflict and confusion between FPC and State jurisdiction which inevitably follows from the FPC's "stub line" theory is of course present in the case here of East Ohio.

1. Ohio is a municipal home rule State, with its municipalities having both statutory and Ohio constitutional authority to grant utility franchises and to contract with utilities for gas and other utility services.[20] Under this authority local distributing companies operate by acquiring franchises or rights to use highways and other public places from local municipal authorities. As the record shows here East Ohio, for example, has franchises in each of the 69 incorporated Ohio communities which it serves (Tr. Vol. I, p. 117; Item 11, Ex. C, Tr. Vol. I, p. 82; Tr. Vol. VII, p. 2513). These franchises cover services or rates or both of East Ohio to these various municipalities. They are for various durations some being for periods as short as two years, and many constitute contracts as authorized by Ohio law (Item 11, Ex. C, *supra*).

Let us pause here. Each of these contracts requires service by East Ohio to the inhabitants of the municipality. Such service can only be accomplished by having East Ohio produce or purchase such Ohio gas as it can and in large measure purchase gas from out-of-state sources and bring it home by its "stub lines." Necessarily, each of these contracts requires continued operation by East Ohio of these "stub lines" and each, if the FPC's "stub line" theory is correct, could be claimed to be a contract *relating*

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[20] E.g., Ohio General Code Sections 3982, 3983, 614-44; The Constitution of the State of Ohio (1851), Article XVIII, Sections 1, 3, 4, 5, 7.

to transportation subject to the jurisdiction of the FPC since these contracts require the movement of gas which East Ohio must make through these "stub lines." Section 4(c) of the Natural Gas Act requires contracts "relating to" any transportation service subject to the jurisdiction of the FPC to be filed with it. Section 4(d) provides that no change can be made in any such contract except on 30 days' notice to the FPC and to the public. Under Section 4(e) the FPC apparently has authority to enter into a hearing as to the lawfulness of the service involved in any such contract. Does this mean that Ohio municipalities cannot exercise their existing Ohio statutory and constitutional authority without being subject to the complicated and expensive procedure and supervening jurisdiction of the FPC?

Obviously this was not the intent of the Natural Gas Act. But by the literal words of Section 4, if the FPC's "stub line" theory is correct and the FPC has federal jurisdiction over all aspects of East Ohio's operation of these "stub lines" as is here claimed, the foregoing ridiculous result would follow. It could, moveover, be supported with the same technical and unrealistic arguments as are presented in the FPC brief before this Court in support of that theory.

2. Except for franchise rates constituting a contract by utility acceptance of an Ohio municipal franchise or Ordinance, all other aspects of these Ohio franchises, including services and rates, are subject to general State jurisdiction. This jurisdiction has been vested in the Public Utilities Commission of Ohio since its establishment in 1911. The Public Utilities Act of Ohio constitutes a complete regulatory act and gives the Ohio Commission complete regulatory jurisdiction over East Ohio and all its activities and properties, since they are all in Ohio. This authority the Ohio Commission has used repeatedly. Ex-

hibit 7 (Tr. Vol. I, p. 128, Tr. Vol. V, p. 2130) is a list of the formal regulatory proceedings before the Ohio Commission involving East Ohio. A summary of these proceedings is as follows (Tr. Vol. I, pp. 128-130):

Ohio Commission Proceedings	*No.*
Involving rates	160
Involving acquisition or sale of property	77
Relating to issuance of securities	11
Relating to accounting practice	4
Relating to termination or beginning of service	3
General complaints as to service, etc.	3
Total	258

In addition to these formal proceedings East Ohio has been required to file annual reports on forms prescribed by the Ohio Commission, conform to the Ohio Commission's uniform system of accounts, install depreciation rates fixed by the Ohio Commission and submit to investigation and examination of various matters by the Ohio Commission (Tr. Vol. I, pp. 130-131). In the most recent Cleveland rate case,[21] for example, the Ohio Commission examined for depreciation and valued all of East Ohio's property, whether classified in its accounts as production, storage, transmission or distribution, except distribution property outside of the Cleveland area and not involved in the case (R. 24-25). In short, East Ohio has no activities of any kind not under supervision and regulation by the State of Ohio and no public utility service or property not regulated in Ohio (R. 24).

3. Suppose that on the "stub line" theory East Ohio is subject to FPC jurisdiction. What follows?

(a) This means that Section 1 of the Natural Gas Act creates an immediate general conflict with Ohio General

[21] *The East Ohio Gas Company v. City of Cleveland*, 56 PUR (NS) 73 (1944).

Code Sections 614-2, 614-2a and 614-4. Under Ohio General Code Sections 614-2 and -2a East Ohio is a public utility subject to the Ohio Commission's jurisdiction because it is a company "engaged in the business of supplying natural gas for lighting, power or heating purposes to consumers within this state." The Ohio Commission's general jurisdiction extends over all of East Ohio's properties including its "stub lines" since it extends to every public utility "the plant or property of which lies wholly within this state" and to the companies "operating the same, and to the records and accounts and business thereof done within the state" (Ohio General Code Section 614-4).

The Ohio Commission may supervise and regulate so as "to require all public utilities to furnish their products and to render all services exacted by the commission, or by law" (Ohio General Code Section 614-3). It has authority to supervise East Ohio and like Ohio utilities "with respect to the adequacy or accommodation afforded by their service" and "with respect to the safety and security of the public" (Ohio General Code Section 614-8). It of course has authority to examine records (Ohio G. C. Sec. 614-7), to prescribe systems of accounts (Ohio G. C. Sec. 614-10), to compel the furnishing of adequate facilities (Ohio G. C. Section 614-13), to prevent rebates and discrimination (Ohio G. C. Secs. 614-14, -15), to fix and order changes in rates other than those fixed by municipal agreement (Ohio G. C. Secs. 614-20 *et seq.*), to hear appeals from and set aside unaccepted ordinance rates and fix substitute rates (Ohio G. C. Secs. 614-44 *et seq.*), to prescribe the form of annual reports (Ohio G. C. Sec. 614-48), to prescribe proper depreciation charges and require the setting up of a depreciation fund (Ohio G. C. Secs. 614-49, -50), to authorize the issuance of securities (Ohio G. C. Sec. 614-53), to approve or forbid the purchase or sale of other utility property (Ohio G. C. Sec. 614-60), and many other usual regulatory powers.

Now as to what the FPC says is interstate commerce on East Ohio's "stub lines"—who has jurisdiction, the FPC, or the Ohio Commission—and if both have it, who is to prevail if the FPC says one thing and the Ohio Commission another? As we understand the FPC brief, the FPC is to prevail; and any action taken by the Ohio Commission with respect to these lines under any of the Ohio Commission powers referred to above is presumably at sufferance. This conflict of jurisdiction is no light matter.

Obviously the Ohio Commission must determine the valuation, operating expenses and return in respect of these lines in connection with its review or fixing of municipal and other local rates, just as it has done many times in the past with respect to East Ohio.[22] If the Federal Power Commission issues an order stating that these lines are to be valued at their depreciated original cost, which is contrary to the Ohio statutory rule on valuation,[23] is the Ohio Commission bound by that order? Upon the Federal Power Commission theory here advanced it apparently would be since the FPC is claimed to have exclusive jurisdiction over these "stub lines."

(b) Under Section 4(b) of the Natural Gas Act the FPC has claimed authority to allocate gas from interstate pipe lines in times of emergency (*City of Detroit v. Panhandle Eastern Pipe Line Co.*, 73 PUR (NS) 371 (FPC

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[22] *The East Ohio Gas Company v. City of Cleveland*, 4 PUR (NS) 433 (1934); *Re East Ohio Gas Company*, 17 PUR (NS) 433 (1937); *The East Ohio Gas Company v. The Public Utilities Commission of Ohio, etc.*, 133 Ohio St. 212; 12 N. E. 2d 765 (1938); *East Ohio Gas Company v. City of Cleveland*, 27 PUR (NS) 387 (1939); *The East Ohio Gas Company v. Public Utilities Commission of Ohio, City of Cleveland v. Public Utilities Commission (Two Cases)*, 137 Ohio St. 225, 28 N. E. 2d 599 (1940); *The East Ohio Gas Company v. City of Cleveland*, 56 PUR (NS) 73 (1944).

[23] Ohio General Code Sections 499-9, 499-13; *City of Marietta v. Public Utilities Commission*, 148 Ohio St. 173, 74 N. E. 2d 74 (1947).

1947); *Council Bluffs Gas Co. v. Northern Natural Gas Co.*, CCH UTIL. LAW REP. (Fed.) ¶ 9082 (FPC 1948)). Under Ohio General Code Sections 614-8, -15 and -32, and its general authority under the sections referred to above, the Ohio Commission has jurisdiction to determine how gas should be distributed by East Ohio in times of emergency (*City of Akron v. The Public Utilities Commission of Ohio*, 149 Ohio St. 347, 78 N. E. 2d 890 (1948)). Does the FPC or Ohio say who shall get the gas which East Ohio carries through its "stub lines"? Under the FPC theory here presented the FPC has exclusive jurisdiction and it is its function to decide the restrictions to be placed on the movement of this gas in Ohio rather than Ohio's function.

(c) Under Section 6(b) of the Natural Gas Act a "natural-gas company" may, among other things, be required to "keep the Commission informed regarding the cost of all additions, betterments, extensions and new construction." Under the Ohio statutes the Ohio Commission has similar authority (e.g. Ohio General Code Section 499-11). Thus the FPC can require East Ohio, on the "stub line" theory of jurisdiction, not only to report additions, betterments, extensions and new construction on its "stub lines" but every change it makes in its thousands of miles of mains in Ohio streets, alleys, highways and lanes. There may here be no precise conflict of jurisdiction, but there is certainly an obvious duplication and a direct economic conflict in that the great expense of this duplication falls upon Ohio consumers.

(d) Under Section 7(a) of the Natural Gas Act the FPC may direct a "natural-gas company" to "extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribu-

tion of natural or artificial gas to the public" etc.[24] As we have seen, under Ohio General Code Sections 614-8, 614-27 and 614-28, jurisdiction over the adequacy of all of East Ohio's facilities is lodged in the Ohio Commission and it has authority to order improvements to promote the convenience or welfare of the public and to secure adequate service. Laying aside the question of whether either the FPC or the Ohio Commission could constitutionally order East Ohio to render a service through its "stub lines" which it has not undertaken, is it the FPC or the Ohio Commission, or both, who have jurisdiction to order it to improve its "stub line" facilities, or to make sales to particular Ohio communities? If the views of the two commissions conflict, which should prevail?

The manner and efficiency of East Ohio's distribution of gas which it acquires from State and out-of-state sources is obviously a matter of purely local concern, yet these particular local problems are to be transferred to Washington under the FPC "stub line" theory. The FPC's brief here specifically so argues (p. 47).

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[24] The legislative history indicates clearly that Section 7(a) was never intended to apply to a company like East Ohio. At the hearings on H. R. 11662, Mr. DeVane undertook to explain Section 7(a) to the Committee. His statement makes it clear that the situation which the draftsmen of the Act were trying to reach was that in which a company owning gas fields and shipping gas in interstate commerce for resale failed to fill their pipeline to capacity when their fields were entirely adequate to fill the line. When asked what the conditions precedent were before Section 7(a) would authorize the Commission to order an extension, Mr. DeVane said: "I was trying to state the conditions precedent in my answer to Mr. Cole's question. There must be all of those conditions precedent. The company must have the gas; you cannot make the company go out and buy gas to fill its pipelines to capacity; it must have extra capacity in its pipeline, and the line must be in close proximity to the community. Now, if all those conditions precedent are present, then the authority is conferred upon the Commission to require the service to the community." (Hearings on H. R. 11662, p. 39.)

(e) Under Section 7(b) of the Natural Gas Act the FPC is given authority to control abandonment of facilities subject to its jurisdiction or any service rendered by means of such facilities. Under Ohio General Code Sections 504-2 and 504-3 the Ohio Commission is given authority in respect of the abandonment of main pipe lines and gas lines. Here there is an obvious conflict of jurisdiction in the event that East Ohio desires to tear up a portion of its "stub lines" for any reason whatsoever. And if the FPC is to have exclusive jurisdiction in this respect, what can be the basis of any proper determination except local service matters which have always been and should continue to be within the province of Ohio's jurisdiction?

(f) Under Section 7(c) of the Natural Gas Act the FPC has authority to grant or withhold certificates of convenience and necessity as to the construction or operation of any facilities involved in the transportation or sale of natural gas subject to its jurisdiction.[25] Let us suppose,

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[25] Completely ignoring the history and purpose of Section 7(c), the FPC has argued that it is a provision of the Natural Gas Act showing the applicability of the statute to a company like East Ohio. Section 7(c) was not included in H. R. 11662 but was inserted when the bill was redrafted as H. R. 4008. At the hearings on this latter bill, a question arose as to who had put the provision in and why. (Hearings on H. R. 4008, p. 81.) Representative Lea, chairman of the Committee, stated that he would "assume responsibility for authorship of Section 7(c)." *Ibid.* He was then specifically asked why he had put Section 7(c) into the redrafted bill. Chairman Lea explained that he thought it was only fair that protection against competition should be given to the companies which were brought under rate regulation for the first time and that Section 7(c) was designed to accomplish that purpose. (*Id.* pp. 82-83.)

The form in which Section 7(c) was originally enacted makes it further clear that this was the purpose of that portion of the Natural Gas Act. It required a certificate of public convenience and necessity only when the area served by one "natural-gas company" was to be invaded by another "natural-gas company." The purpose quite obviously did not extend to any broad regulation of the gas resources of the nation but was rather a protection

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as happens to be the fact, that East Ohio proposes to extend its local service to the Village of Brecksville, which is a Cleveland suburb. In order to do so East Ohio would have to arrange, and as a matter of fact has arranged, for a franchise and made a contract as to rates with Brecksville. This additional local service will necessarily involve some additional construction in connection with its "stub lines." Before East Ohio can render this service, must it and the Village of Brecksville run down to Washington to convince the FPC that this local service is in the public interest? The Ohio Commission is satisfied that East Ohio has ample resources and adequate gas supplies for this additional local service. It therefore has no occasion to exercise its statutory authority to stop such service in the interest of other presently attached consumers of East Ohio. Intervention by the FPC in this situation would clearly be direct interference with local distribution and local distribution facilities.

(g) Under Section 8(a) of the Natural Gas Act the FPC has authority to require a "natural-gas company" to follow its prescribed method and system of accounting. The Ohio Commission has similar statutory authority as to East Ohio (Ohio General Code Sections 614-10, 499-10). Here the Natural Gas Act recognizes the possibility of a gas company being required to keep accounts both for the FPC and for a State Commission. This proviso is of course necessary in those cases, which were familiar to

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for the interstate wholesale service which previously had been unregulated and was brought under regulation for the first time in the Natural Gas Act.

Section 7(c) was, of course, amended in 1942 (56 Stat. 83) to provide for a much broader regulation. But in determining the companies which were intended to be regulated as "natural-gas companies" we must look to the Act as it was enacted in 1938. In the 1938 Act, Section 7(c) was not intended as an independent regulatory provision which could broaden the scope of the term: "natural-gas company."

the drafters of the Natural Gas Act, in which a pipe line company not only sold gas to local distributing companies and municipal plants along its lines but also engaged directly in the local distribution of gas. In such cases there is unfortunately no way of eliminating the economic conflict involved unless the State Commission for all practical purposes abdicates.

In the case of East Ohio where there is no reason for duplicate accounting, except the FPC's purely mechanical "stub-line" theory, the economic conflict is indeed great.

To develop the information required by the FPC accounting and other orders here under consideration, East Ohio would be required to establish and maintain a completely new and entirely different accounting system at great cost.[26] Since "original cost" studies have to be made according to the FPC of all of East Ohio's property from the date it was first used to fulfill a public utility obligation (Ex. 1, Item 1, Tr. Vol. I, pp. 81-82, R. 69; Ex. 1, Item 5, R. 71; Ex. 1, Item 6, Tr. Vol. IV, p. 1541; Ex. 1, Item 8, R. 74; Ex. 1, Item 21, R. 83), it would require inspection and determination of property and accounts from 1846 to the present time (Sen. Doc. 92, 70th Cong., 1st Sess., Part 83, p. 1697). The initial cost for such a tremendous undertaking has been estimated to be between $1,500,000 and $2,000,000, as the record shows (R. 25), and the FPC did not quarrel with this estimate at the hearing. The year-to-year upkeep from here on out will be many hundreds of thousands of dollars. The FPC now claims the estimate is somewhat too high, but offered no testimony to the contrary. Our experience would lead us to believe that the estimate is much too low, since this first batch of accounting data is probably a mere forerunner. This tremendous cost to East Ohio is

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[26] This is so even where the Ohio Commission grants permission to use the FPC system of accounts because the FPC has certain views on "original cost" which the Ohio Commission believes are not necessary for Ohio accounting purposes.

only a part of the State of Ohio's concern, for if the FPC's theories are to prevail, practically every local gas distributing company in Ohio will be put to great expense in furnishing *strictly unnecessary* data to the FPC.

When all of this tremendous expense has been incurred, there is nothing, nevertheless, that will have been done which can be of any interest or any possible use—either nationally or locally.[27] Certainly our Ohio residents are not going to be pleased at paying gas bills higher than they need otherwise be in order that reports and original cost studies can gather dust in the files of the FPC.

It makes no practical difference to any one outside of Ohio, and none to the regulatory authorities or residents of Ohio, that a particular service line in a back street of Cleveland cost $10 or $20 in 1846 when it was first laid by one of the manufactured gas companies whose properties were merged into East Ohio.

(h) Under Section 9(a) of the Natural Gas Act the FPC has absolute authority to fix the proper and adequate rates of depreciation and amortization of the several classes of property of each "natural-gas company" used or useful in the production, transportation or sale of natural gas. Moreover each such company is required to conform its depreciation and amortization accounts according to the rates so fixed. In this instance there is a direct conflict with the similar authority of State commissions, including Ohio (Ohio General Code Sections 614-49 and 614-50), since Section 9(a) specifies that the State Commissions may disregard such rates as fixed by the FPC *only* "for the purpose of determining rates or charges." Thus the FPC's notions as to depreciation rates and charges for East Ohio's facilities in the 69 Ohio municipalities it serves are to override those of the Ohio Commission, despite the

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[27] Original cost on the FPC theories is of no importance in Ohio rate making. Ohio General Code Sections 499-9 *et seq.*, 499-13 (last sentence); *City of Marietta v. Public Utilities Commission*, 148 Ohio St. 173, 74 N. E. 2d 74 (1947).

fact that the Ohio Commission has long supervised these rates and charges and that their amount is certainly a matter of purely Ohio concern.

This FPC authority has a further indirect conflict with other authority of the Ohio Commission. Under Ohio General Code Sections 614-53, -54 and -55 the Ohio Commission has jurisdiction and must approve issuance of all securities by East Ohio and other public utilities. It is obvious that the amount of depreciation and amortization reserves as well as the current charges to operations for this purpose are matters of great concern in connection with security issues. Under Ohio law, depreciation reserves and current depreciation charges properly used under its supervised administration will result in a certain asset and operating statement upon which proposed securities can be issued. To the extent that the FPC changes these figures, one way or another, it will interfere directly with Ohio's determination as to what securities issues it will approve. In this instance the Ohio regulatory authorities can not disregard what the FPC has determined. They may disregard it, irrespective of its validity in view of local circumstances, only when rates are being determined.

(i) Under Section 10(a) of the Natural Gas Act the FPC may require annual as well as many other reports, all in great detail. The Ohio Commission has similar authority (Ohio General Code Section 614-48). Here again we have the economic conflict involved in burdening Ohio gas consumers with the expense of duplicate and unnecessary reporting.

(j) Under Section 14(b) of the Natural Gas Act the FPC may determine the adequacy or inadequacy of gas reserves held or controlled by a "natural-gas company." Not only this, but it may determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals for unoperated leases. As we have seen, the Ohio Commission has full and ade-

quate authority over the adequacy or inadequacy of East Ohio's facilities. If it deems it necessary to determine the adequacy of East Ohio's gas reserves, it can of course do so. Suppose it finds them adequate or inadequate and the FPC in a duplicate hearing finds them otherwise? Are the public relations and financing of East Ohio and other local distributing companies to be adversely affected by a report of the FPC that differs from a corresponding conclusion of the Ohio Commission?

Moreover in Ohio the matter of treatment of delay rentals in operating expenses and valuation both for accounting and rate making purposes has received extensive consideration by the Ohio Commission and the courts.[28] This matter is now settled in Ohio and to the satisfaction of every one. In the last Cleveland rate case (*The East Ohio Gas Company v. City of Cleveland*, 56 PUR (NS) 73 (1944)), neither side appealed to the Supreme Court of Ohio, although such appeals had theretofore been frequent. Indeed, since this litigation East Ohio has had no rate litigation before the Ohio Commission. Nevertheless under Section 14(b) the FPC apparently has exclusive jurisdiction, if such local distributing companies as East Ohio are held to be "natural-gas companies" under the Act, to upset this settled and accepted method of handling delay rentals for all purposes.

Thus it is apparent that numerous actual statutory conflicts in jurisdiction as well as distressing economic conflicts arise as soon as any theory is propounded that local Ohio distributing companies become subject to FPC jurisdiction on account of their "stub line" connections to interstate sellers. A few of these actual and potential conflicts we have noted. Many more will arise over the

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[28] E.g., *The East Ohio Gas Company v. Public Utilities Commission, City of Cleveland v. Public Utilities Commission* (*Two Cases*), 137 Ohio St. 225, 28 N. E. 2d 599 (1940).

course of the years unless the FPC's "stub line" theory is denied by this Court, as it should be.

In this connection we again note that if the general words as to transportation in interstate commerce in Section 1 of the Act are confined to their common sense meaning—the *business* of transporting natural gas—all of this conflict and confusion disappear. A gas company, even though operating solely within Ohio, which transports interstate gas for others for hire or transports interstate its own gas for sale at wholesale would properly be subject only to FPC jurisdiction. All of its accounting, its reports, its operations, supervision of its facilities as to adequacy or inadequacy and so on could then, as they properly should under such circumstances, be controlled only by the FPC.[29]

As to this type of company there was of course a regulatory gap, and it was obviously this gap as to interstate transportation that was intended to be filled by Congress. There was no intent to create the conflict and confusion, exemplified in the preceding discussion as to East Ohio, which result from the solely mechanical approach upon which the FPC's "stub line" theory is predicated.

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[29] Should such a company, or one of similar operations whose lines cross into another State, sell gas from its pipe lines for industrial purposes, the Ohio Commission, which has the authority to regulate such an industrial rate (*Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U. S. 507 (1947)), could secure the help of the FPC under Section 5(b) of the Natural Gas Act. This is an instance of the harmony with and assistance to State regulation which were often referred to in the Hearings.

III. THE FPC ORDERS HERE INVOLVED, AND ANY PROVISIONS OF THE NATURAL GAS ACT CONSTRUED TO AUTHORIZE THEIR ISSUANCE, CONSTITUTE AN INVASION OF THE POWERS RESERVED TO THE STATE OF OHIO UNDER THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND AN INVALID EXTENSION OF THE POWERS DELEGATED TO THE FEDERAL GOVERNMENT BY ARTICLE I, SECTION 8, THEREOF.

It is of course conceded by the FPC that except for East Ohio's "stub lines" it is engaged in purely intrastate activities. As the record shows, these "stub lines" are a very small fraction of the total of the pipe line mileage of East Ohio's system. They are necessarily a small fraction of its total facilities. On the other hand the accounting and other orders here involved require information and data as to *all* of East Ohio's properties. There is presented a very real question—even if the Natural Gas Act specifically authorizes these FPC orders. As to a company like East Ohio can such orders and the statutory provisions under which they are issued be sustained under the Federal Constitution?

Since the decision of the Supreme Court in *Electric Bond & Share Company v. Securities and Exchange Commission,* 303 U. S. 419 (1938), there can be no doubt that provisions for the control of accounting and requirement of information are in themselves a "type of regulation" (303 U. S., 437, 439). Here the FPC's insistence on its accounting procedure and requests for statistics and information on *all* of East Ohio's properties—down to every last bit of its piping in Ohio streets and alleys—is obviously a regulation of intrastate commerce. Congress may not regulate intrastate commerce, since such power is not delegated to Congress but specifically reserved to the States (United States Constitution, Article I, Section 8, Tenth Amendment).

Clearly a matter does not cease to be intrastate within this constitutional doctrine just because one person or company conducts business both intrastate and interstate. Cf.

Public Utilities Commission v. Attleboro Steam and Electric Co., 273 U. S. 83 (1927). Yet in the FPC view of the Constitution a person doing both *ipso facto* can never resist—nor can the State where he does local business—complete and detailed federal regulation of all of his business, both interstate and intrastate.

The case of *Interstate Commerce Commission v. Goodrich Transit Company*, 224 U. S. 194 (1912), on which the FPC relies (Brief, pp. 77-78) does not support this FPC view. That case of course is based upon a sound and realistic approach to constitutional questions. If the fact is that regulation of interstate commerce which Congress has undertaken *reasonably requires* intrastate data or Congressional accounting as to intrastate business and facilities, Congress may require it. The obvious error in the FPC argument arises from its failure to recognize that there is no reasonable relationship between the information and accounting required by the FPC as to all of East Ohio's properties and the Congressional regulation—if actually intended and obviously it was not intended—of East Ohio's "stub lines."

At most the FPC claims that the abandonment, enlargement or connection to others of these Ohio lines could be supervised by it under Section 7. On the issues so involved, reports and accounting on these lines could have very little usefulness and certainly reports and accounting on the great balance of East Ohio's properties would have absolutely none.

The fact is that the FPC does not present a single argument to show the *reasonable necessity* of its orders here involved in order to enable it to exercise the regulatory powers which it claims over East Ohio's "stub lines." Unless there is such a reasonable necessity, and here there is none, the orders here involved and any provisions of the Natural Gas Act construed to support them must fall under the practical concepts of State and federal power which are incorporated in the Constitution.

It is noteworthy that the Natural Gas Act itself, e.g.,

Section 8(a), prescribes that the FPC's regulatory tools are to be used "as necessary or appropriate for purposes of the administration of this Act." Assuredly this does not mean that the FPC has unlimited power to gather whatever information it wants irrespective of its scope, expense imposed and actual usefulness. Congress did not set up the FPC as an unlimited inquisitorial agency. When challenged, as here, the FPC should be able to establish the necessity and appropriateness of the information it seeks. Here it has not even tried to do so.

We hardly need again point out that the drafters of the Natural Gas Act were imbued with one dominant purpose. That was to keep the jurisdiction of the FPC within plain constitutional limits so far as federal and State powers were concerned, and to avoid any suggestion of infringing on the powers reserved to the States and their Commissions. It seems apparent to Ohio and to the Ohio Commission that the FPC's utter misconception of its field in the assertion of its "stub line" theory against East Ohio not only violates the express language and the declared purpose of the Natural Gas Act, but reaches into the realm of exclusive State jurisdiction which the United States Constitution preserves to Ohio.

Respectfully submitted,

HERBERT S. DUFFY,
Attorney General of Ohio,

KENNETH B. JOHNSTON,
Assistant Attorney General of Ohio,

Attorneys for Respondents the State of Ohio and The Public Utilities Commission of Ohio.

HAROLD L. MASON, *Chairman,*
HARRY M. MILLER, *Commissioner and Former Chairman,*
RAY O. MARTIN, *Commissioner,*
The Public Utilities Commission of Ohio,
Of Counsel.

Columbus, Ohio,

In the Supreme Court
OF THE
United States

October Term, 1949

No. 71

Federal Power Commission,
Petitioner,
vs.
East Ohio Gas Company, et al.,
Respondents.

BRIEF FILED ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS.

Everett C. McKeage,
Roderick B. Cassidy,
Boris H. Lakusta,
H. F. Wiggins,
J. Thomason Phelps,
Harold McCarthy,
State Building, San Francisco 2, California,
Attorneys for the Public Utilities Commission of the State of California,
As Amicus Curiae.

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OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported in 173 Fed. (2d), page 429.

PRELIMINARY STATEMENT.

The Public Utilities Commission of the State of California, on whose behalf this *amicus curiae* brief is offered to be filed, is an agency of the State Government of the State of California, existing under and by virtue of the provisions of the Constitution and laws of said State, and having exclusive jurisdiction over all public utilities operating within said State.

FACTUAL SITUATION.

The Court of Appeals has clearly stated the factual situation involved in this controversy at pages 429 to 432 of the Federal Reporter and will not be repeated here (173 Fed. (2d) 429).

CRITICAL ISSUE IS WHETHER OR NOT THE OPERATIONS OF RESPONDENT GAS COMPANY ARE OF A LOCAL NATURE, OR OTHERWISE EXEMPT FROM PROVISIONS OF NATURAL GAS ACT OF 1938.

The fact that some of the operations of respondent gas company constitute interstate commerce (as that term is generally understood) is not at all controlling of the issue herein. That a State may regulate interstate commerce, where the field has not been completely occupied by the Federal power is elementary. (*Simpson v. Shepard,* 230 U.S. 352, 402, 57 L.ed. 1511, 1542; *Kelly v. Washington,* 302 U.S. 1, 9-10, 82 L.ed. 3, 10.) Even where State regulation "materially interferes with interstate commerce," this Court has held, in a very recent case, that such fact is not conclusive of the invalidity of such regulation. (*Rail-*

way Express Agency v. New York, 93 L.ed. (Adv. Op.) 396, 399.) Also, this Court has held that the transportation and sale in interstate commerce of gas directly to the ultimate consumer, although such transportation was across a State line and was interstate commerce beyond any doubt, was of a local nature and subject to State regulation. (*Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23, 29-31, 64 L.ed. 434, 442.)

Our next inquiry is: Has the Congress, by enactment of the Natural Gas Act of 1938 (15 U.S.C.A. 717-717W), so completely occupied the field as to bring the operations of the respondent gas company within the regulatory jurisdiction of the Federal Power Commission? In arriving at an answer to this question, it must be kept in mind that the superseding of State power by Federal power is never presumed. The conflict between these two powers must be *direct* and *positive*, leaving no doubt that the intention to supersede State power is plainly manifested. (*Kelly v. Washington*, 302 U.S. 1, 9-10, 82 L.ed. 3, 10.) Furthermore, this Court has laid it down as a principle that it "has disfavored inroads by implication on state authority * * *." (*Palmer v. Massachusetts*, 308 U.S. 79, 83-84, 84 L.ed. 93, 97-98.) There can be no possible argument against the proposition that the Congress has exempted from the operation of the Natural Gas Act of 1938 all interstate transportation or sale of natural gas, which is not specifically subjected to the provisions of said Act or which constitutes local distribution of natural gas. Likewise, the facilities used for such distribution are exempted from the provisions of the Act, as are, also, the production or gathering of natural gas. (Sec. 1, 52 Stat. 821, 15 U.S.C.A. 717(b).)

The Court below took the view that the operations of respondent gas company were of a local nature and, therefore, exempt from the jurisdiction of the Federal Power Commission. Also, that Court was of the further view that, due to the fact that all the operations of respondent gas company were subject to State regulation and had actually been subjected to such regulation for many years, such operations were not meant to be subjected to Federal regulation, it being the intent of said Natural Gas Act to *supplement*, not *supersede* State regulation. With these views, we agree.

This Court, by unanimous decision, in the case of *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 689-690, 91 L.ed. 1742, 1748, held that the intent of said Act was to "occupy this field in which the Supreme Court has held that the States may not act." This Court further observed in that case that the intent of the Act is to take no authority from State commissions and is so drawn as to complement and in no manner usurp State regulatory authority. (U.S. Report, p. 690.) To the same effect is this Court's unanimous decision in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 520, 92 L.ed. 128, 139. And, finally, this Court in the very recent case (decided June 20, 1949) of *Federal Power Commission v. Panhandle Eastern Pipe Line Company*, 93 L.ed. (Adv. Op.) 1251, 1253-1254, held that the intent of the Natural Gas Act was not to completely occupy the natural gas field to the limit of constitutional power and that the jurisdiction granted to the Federal Power Commission was to complement that of the State regulatory bodies.

CONCLUSION.

In view of the foregoing pronouncements of this Court as to the purpose and intent of the Natural Gas Act of 1938, it is abundantly clear that the attempted exercise of jurisdiction by the petitioner over respondent gas company runs afoul the provisions of said Act as construed and interpreted by this Court. We, therefore, respectfully contend that the decision and judgment of the lower Court are correct and should be affirmed.

Dated, San Francisco, California,
October 3, 1949.

Respectfully submitted,

Everett C. McKeage,
Roderick B. Cassidy,
Boris H. Lakusta,
H. F. Wiggins,
J. Thomason Phelps,
Harold McCarthy,

Attorneys for the Public Utilities Commission of the State of California,
As Amicus Curiae.

No. 71

IN THE

Supreme Court of the United States

October Term, 1949.

Federal Power Commission, *Petitioner*,

v.

The East Ohio Gas Company, et al., *Respondent*.

BRIEF ON BEHALF OF THE INDIANA PUBLIC SERVICE COMMISSION, THE MICHIGAN PUBLIC SERVICE COMMISSION, THE WISCONSIN PUBLIC SERVICE COMMISSION, AND THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICI CURIAE.

Walter R. McDonald,
Austin L. Roberts, Jr.,
Attorneys for said State Commissions and said Association,
7413 New Post Office Building,
I. C. C. Section,
Washington 25, D. C.

November 2, 1949.

Press of Byron S. Adams, Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 71.

FEDERAL POWER COMMISSION, *Petitioner*,

v.

THE EAST OHIO GAS COMPANY, ET AL., *Respondent*.

BRIEF ON BEHALF OF THE INDIANA PUBLIC SERVICE COMMISSION, THE MICHIGAN PUBLIC SERVICE COMMISSION, THE WISCONSIN PUBLIC SERVICE COMMISSION, AND THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICI CURIAE.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported in 173 F. 2d 429.

PRELIMINARY STATEMENT.

The Indiana Public Service Commission, the Michigan Public Service Commission, and the Wisconsin Public Ser-

vice Commission are agencies of state government of the States of Indiana, Michigan, and Wisconsin respectively, existing under the provisions of the laws of the respective States, and having complete jurisdiction over natural gas distributing companies operating within the respective States.

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as the "Association", is a voluntary organization embracing within its membership the members of the regulatory commissions and boards of the several States of the United States, except Delaware.

By the constitution of the Association, the President of the Association, and the Executive Committee, or either of them, may direct the General Solicitor to represent the Association (as distinguished from a particular commission represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President or Committee, representation on behalf of the Association should be made. This brief is offered for filing on behalf of said Association by direction of the President and of the Executive Committee in the general public interest.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the United States Court of Appeals for the District of Columbia Circuit reversing certain orders of the Federal Power Commission, hereinafter referred to as the "Commission".

The facts of this case, so far as necessary to be stated for the purpose of this brief, are as follows:[1]

The East Ohio Gas Company, hereinafter referred to as "East Ohio", is an Ohio corporation with its principal place of business in Cleveland, Ohio. East Ohio is solely engaged in the business of direct local distribution of nat-

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[1] The facts in the case, as summarized here, are taken from the opinion of the Court of Appeals below (173 F. 2d 429, 429-432).

ural gas within the State of Ohio. All properties and facilities owned and operated by East Ohio lie within the physical boundaries of the State of Ohio, East Ohio distributing natural gas in Ohio by means of an extensive pipe line system, with none of East Ohio's pipe lines crossing State lines. East Ohio makes no sales of any kind to any other company for resale purposes and none of the gas sold by East Ohio is consumed outside of Ohio, that is, none of the gas in the pipe lines of East Ohio flows out of the State of Ohio.

East Ohio has three sources of natural gas supply: Hope Natural Gas Company (hereinafter referred to as "Hope"), the Panhandle Eastern Pipe Line Company (hereinafter referred to as "Panhandle"), and native Ohio natural gas fields. The gas procured by East Ohio from Hope and from Panhandle is from sources outside the State of Ohio, principally from West Virginia, Texas, Oklahoma and Kansas. For the purpose of serving its own customers, East Ohio owns and operates several pipe lines running from the cities and towns where local distribution is completed to points of connection, within Ohio, with the pipe lines of Hope and Panhandle where the out-of-state natural gas is received.

East Ohio has long been subject to complete regulation by the Public Utilities Commission of the State of Ohio, hereinafter referred to as the "Ohio Commission". The Ohio Commission has repeatedly and continuously exercised its regulatory powers over all the business activities and property of East Ohio. This regulation has included the setting of numerous rates, the supervision of acquisitions, sale of property and security issues, the control of accounting principles, inauguration and termination of service, examining service companies and requiring the submission of detailed reports of the Ohio Commission. The complete and thorough regulation of East Ohio by the Ohio Commission is more fully covered in the briefs filed by other parties to this proceeding.

The Federal Power Commission orders now under review require East Ohio's complete submission to the jurisdiction of the Commission and further require preparation of annual financial and statistical reports covering all of East Ohio's properties in operation year by year since 1939. By these orders East Ohio is also required to change its entire accounting system for all of its properties so as to conform to the accounting system prescribed by the Commission; namely, one subscribing to the "original cost" theory of accounting.

The Court of Appeals on February 14, 1949, reversed these orders of the Commission. This ruling is now being appealed to this Court.

THE QUESTION PRESENTED.

The question involved in this case may be stated as follows: Is a company, which owns and operates facilities located only in a single state for the sole purpose of serving its own ultimate-consumer customers, nevertheless a "natural gas company" under the Natural Gas Act where, for the purpose of said business, such company carries through its facilities, between a point of connection with an interstate pipe line company and the cities and towns in which local distribution is completed, natural gas which has been imported into the state by the interstate pipe line company?

SUMMARY OF ARGUMENT.

The states are free, in so far as the Commerce Clause is concerned, to make laws affecting interstate commerce, provided Congress has not acted to prevent such state regulation; and provided the subject matter of the regulation is primarily a matter of local concern not requiring national uniformity. *Minnesota Rate Cases, Simpson v. Shepherd,* 230 U. S. 352, 399. Congress has not acted to prevent state regulation of natural gas distributing companies whose facilities are located wholly within a single state.

The facts of the instant case show that the facilities owned and operated by East Ohio are wholly within the State of Ohio, and their operation is primarily a matter of local concern, not requiring national uniformity of regulation. It has been the long-standing and well-considered policy of Congress to permit the states to regulate local utility service. This was the purpose of Congress in exempting the business of local distribution from federal regulation, as revealed by the legislative history and the express language of the Natural Gas Act. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, and other cases. This accords with the similar purpose of the exemption provision contained in the Federal Power Act. If the Commission's assertion of jurisdiction in the instant case is valid, then state regulation of direct sales and services to ultimate consumers is inhibited, not only as to gas, but as to electric energy and as to every other character of local utility service so rendered. The Supreme Court has held contrawise as to electric energy in the case of *Connecticut Light and Power Co.* v. *Federal Power Commission*, 324 U. S. 515. The Supreme Court has never heretofore failed to sustain state regulation of sales to ultimate consumers of whatever kind or character. The tendency of the later decisions is especially pronounced in this direction. *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408.

The instant case does not involve any unique or extraordinary circumstances. Other local distributing companies throughout the country, undoubtedly numbering in the hundreds, likewise receive out-of-state gas which they sell only to their own ultimate-consumer customers within a single state. In the petition of the Commission for a writ of certiorari in the instant case, it is stated that there are now pending before the Commission 43 similar cases. (United States Supreme Court, October Term, 1948, No. 789, at page 19 of petition) The attempted inroad upon state regulation, implicit in the orders under review, unsupported by express statutory authority and diametrically

opposed to the intent of Congress, should be rejected by this Court at the threshold as it has rejected similar attempts in the past.

ARGUMENT.

A Company Which Engages Solely in the Business of Local Distribution of Gas is Exempt from Federal Regulation, Whether or Not Some of its Operations are Interstate in Character.

The Commerce Clause does not prohibit all state regulation of interstate commerce. A long line of Supreme Court decisions, beginning with Chief Justice Marshall's opinion in *Wilson* v. *Black Bird Creek Marsh Company,* 2 Pet. 245, 7 L. ed. 412, rendered in 1829, and followed in the leading case of *Cooley* v. *Port Wardens,* 12 How. 299, 319, 13 L. ed. 996, 1005 (1851), has established beyond question the right of the states, under certain circumstances and notwithstanding the Commerce Clause, to make laws affecting or regulating interstate commerce.

The existence of this right and the circumstances under which it may be exercised are clearly stated in this frequently-quoted declaration by Mr. Justice Hughes, later Chief Justice, in the *Minnesota Rate Cases, Simpson* v. *Shepherd,* 230 U. S. 352, 399 (1913):

> ". . . It has repeatedly been declared by this court that as to those subjects which require a general system of uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. (citing cases)"

This principle has been reasserted and applied in Supreme Court decisions too numerous to cite. Through the years, the rule has lost none of its original significance, as well illustrated by the application thereof in *South Carolina State H. Department* v. *Barnwell Bros.*, 303 U. S. 177 (1938), where the Court, in holding constitutional a state statute prescribing motor truck length, width and weight limitations said:

> "While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since Wilson v. Black Bird Creek Marsh Co., 2 Pet. 245, 7 L. ed. 412, and Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints." (page 185)

This same principle was repeated by the Supreme Court in June, 1945, when the late Chief Justice Stone, in *Southern Pacific Company* v. *Arizona*, 325 U. S. 761, after repeating almost exactly the above-quoted language of the *Barnwell case*, added:

> "... When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority. (citing cases)" (page 767)

It is plain that the states are free, in so far as the Commerce Clause is concerned, to make laws affecting inter-

state commerce, provided Congress has not acted to prevent such state regulation, and provided the subject matter of the regulation is primarily a matter of local concern not requiring national uniformity.

Whether a particular subject matter of state regulation is primarily a matter of local concern is almost wholly a question of fact, to be determined by weighing all the practical considerations which argue for and against such a conclusion. The function of the courts in this regard was well stated in the very recent case of *Prudential Insurance Company* v. *Benjamin,* 328 U. S. 408, decided June 3, 1946, which, with its companion case of *Robertson* v. *California,* 328 U. S. 440, decided the same day, sustained both state taxation and regulation of interstate insurance business. In the *Prudential case,* the court made this very clear statement:

> "... concurrently with the broadening of the scope for permissible application of federal authority, the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce, and to doing so by a new, or renewed, emphasis on facts and practical considerations rather than dogmatic logistic. These facts are of great importance for disposing of such controversies. For in effect they have transferred the general problem of adjustment to a level more tolerant of both state and federal legislative action." (page 420)

Much the same view was expressed in *Southern Pacific Company* v. *Arizona, supra,* where the court said (page 770):

> "... in their application state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgment. Terminal R. Assoc. v. Brotherhood of R. Trainmen, *supra.* (318 U. S. 8 ...); Southern Ry. Co. v. King, 217 U. S. 524 ..."

We turn then to a consideration of the facts involved in the instant case. These show, without controversy, that East Ohio is solely engaged in the business of direct local distribution of natural gas in the State of Ohio and that all of the facilities owned and operated by East Ohio are located wholly within the physical boundaries of that State. The public interest involved is a matter unquestionably of local concern. The operations of East Ohio involve regulation which cannot be well administered from the federal level.

Not only are distribution systems serving local areas a matter of local concern, but they are matters which by their very nature admit of "diversity of treatment according to the special requirements of local conditions" (to use the language of Mr. Justice Hughes in the *Minnesota Rate Cases*, quoted above). Problems arising from the sale of natural gas to ultimate consumers vary widely from state to state and from company to company. What regulatory laws are necessary and what Commission policies are necessary in administering those laws is obviously dependent upon the local conditions in each state. It is not necessary to elaborate upon the practical difficulties which would be involved if Congress attempted to deal with these local and varying problems on a national basis. The best evidence of the existence of these practical difficulties is that Congress, having before it the problem of regulating the natural gas industry, deliberately chose to exempt the business of local distribution from federal regulation.

The Commission, as a body of limited jurisdiction, must find statutory authority for its action. *New York Cent. Secur. Corp.* v. *United States*, 287 U. S. 12. This is doubly true where a conflict with state jurisdiction is involved. As this court said in *Palmer* v. *Massachusetts*, 308 U. S. 79, 84,

> ". . . In construing legislation, this Court has disfavored inroads by implication on State authority and resolutely confined restrictions upon the traditional power of states to regulate their local distribution to the plain mandate of Congress . . ."

This court aptly summarizes the correct view in *Pennsylvania R. Co.* v. *Public Utilities Commission*, 298 U. S. 170, when it said, in rejecting a contention in determining whether railroad transportation, partly by private carrier and partly by common-carrier, is subject to Interstate Commerce Commission regulation under the Interstate Commerce Act:

> "If the concept of transportation is in need of expansion it is for the legislative department of the Government to determine how great the change shall be."

Petitioner, in its brief, relies heavily upon the decision of this Court in *East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U. S. 465, and recites the following language from that case (p. 470):

> "The transportation of gas from wells outside Ohio by the lines of the producing companies to the state line and thence by means of appellant's high pressure transmission lines to their connection with the local system is essentially national—not local—in character and is interstate commerce within as well as without that State. The mere fact that the title or the custody of the gas passes while it is en route from State to State is not determinative of the question where interstate commerce ends . . ."

It is to be noted that the *East Ohio* v. *Tax Commission case* did not determine where interstate commerce ended and intrastate commerce began, and in the above excerpt was discussing the overall movement of the gas from "wells outside Ohio". The present case does not involve the transportation from "wells outside Ohio", and the language of the *East Ohio* v. *Tax Commission case*, accordingly, is in no manner controlling in the present case. The operations and facilities of East Ohio are solely within the State of Ohio and it is only these intrastate facilities which are under consideration in the present case. Whether or not some of the operations of East Ohio in the present case contain any interstate elements, is not relevant.

The question that is controlling of the issue is whether · not the Commission has statutory authority to regulate ie operations of East Ohio. By both the express language ' the Natural Gas Act and its legislative history it is early shown that Congress did not intend to grant any ich statutory authority to the Commission.

a) *Such Exemption Is Provided by the Express Terms of the Act.*

Section 1 (b) of the Act provides as follows:

> "(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." [2]

Section 2 of the Act, containing the definition of terms ed in the Act, reads in pertinent part as follows:

> "When used in this Act, *unless the context otherwise requires*— . . .
>
> "(6) 'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.
>
> "(7) 'Interstate Commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States." [3] (Emphasis supplied).

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[2] 52 Stat. 821 (1938), 15 U.S.C., Section 717(b) (1946).
[3] 52 Stat. 821-2 (1938), 15 U.S.C., Sections 717a (6) and (7) (1946).

The words "unless the context otherwise requires" clearly authorizes the consideration of Section 1 (b) in reaching a precise understanding of what is meant by "natural gas company".

Section 1 (b) clearly states that the provisions of the act shall not apply "to the local distribution of natural gas" or to "facilities used for such distribution." Since East Ohio is engaged solely in the local distribution of natural gas to local consumers and since all of its facilities are used for such distribution, the plain meaning of the language certainly exempts the operations of East Ohio from the regulatory jurisdiction of the Commission.

The Commission is attempting to exercise authority over East Ohio because East Ohio owns and operates large-diameter high-pressure pipe lines which connect up its local distribution system with its source of supply from Hope and Panhandle. The Commission asserts that because of these pipe lines, East Ohio is a natural gas company "engaged in the transportation of natural gas in interstate commerce", under Section 2 (6) of the Act, and thus subject to Commission jurisdiction. Such a contention overlooks the express language of Section 1 (b) which exempts "the facilities used for such distribution."

As pointed out above, the words "unless the context otherwise requires" contained in Section 2, clearly authorizes the consideration of the provisions of Section 1 (b) in reaching an understanding of the term "natural gas company" contained in Section 2 (6).

Where there is an inconsistency between a statutory definition and a section defining the application of an act, the latter is to be given effect. The several sections of a statute should, if possible, be read as consistent rather than as conflicting. *Helvering* v. *Credit Alliance Corp.*, 316 U. S. 107.

In *Brewer* v. *Blougher*, 14 Pet. 178, this court stated:

> "It is undoubtedly the duty of the court to ascertain the meaning of the Legislature, from the words used in the statute, and the subject matter to which it re-

lates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the Legislature never designed to embrace in it." (page 198)

Additional words of qualification, needed to harmonize a general and a prior special provision in the same statute, should be added to the general provision rather than to the special provision. *Rodgers* v. *United States*, 185 U. S. 83, 90.

In *Stephens* v. *Cherokee Nation*, 174 U. S. 445, this court made the following statement:

"The words (in a statute) cannot be construed as redundant and rejected as surplusage, where they can be given full effect, and it cannot be assumed that they tend to defeat, but rather that they are in effectuation of, the real object of the enactment." (page 480)

Similarly, this court has stated in *United States* v. *American Trucking Associations*, 310 U. S. 534:

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act." (page 542)

Similarly, this court has held that, if possible, effect should be given to every clause and part of a statute. *D. Ginsberg and Sons* v. *Popkin*, 284 U. S. 205.

In *Markham* v. *Cahell*, 326 U. S. 404, it was stated that if a strict ruling of a law results in the emasculation or deletion of a provision which a literal reading would preserve, the latter is to be preferred. It is a general rule of statutory construction, that in determination the meaning of words used in a statute it is necessary to consider the context of the statute and the policy of the law, with due regard for the purpose for which it was enacted. *United States* v. *Dotterweich*, 320 U. S. 277; *United States* v. *Raynor*, 302 U. S. 540.

The term "local distribution" is not defined in the Natural Gas Act. Accordingly, it is proper to look to the legislative history to see what Congress meant by that term. Clearly, Congress was thinking of the business of local distribution—not any mechanical text based on the kind or character of pipe used. This is established by the legislative development of Section 1 (b) to its present form.

(b) *The Legislative History of the Act Indicates That Such Exemption Was Intended*

The purpose of Congress in framing the Natural Gas Act was clearly to occupy only so much of the regulatory field, as it understood, in the light of the decisions of the Supreme Court, could not be reached by state authorities under ordinary circumstances. Congress desired only to fill in the hiatus or gap in regulation that then existed. This is made self-evident not only by reading of the express language of the Act but also by a review of the legislative history.

Federal regulation of interstate natural gas pipeline companies was first proposed in the 74th Congress. Such a proposal was contained in Title III of H. R. 5423—74th Congress, introduced on February 6, 1935. H. R. 5423 was subsequently enacted into the Public Utilities Act of 1935. Title III was deleted, however, prior to enactment because

of opposition and criticisms to certain of its provisions and because the Federal Trade Commission had not yet completed its investigation and report of utilities which was then in progress. See Federal Utility Regulation Annotated (1943) Public Utility Reports, Inc., pages 627-629.

On March 6, 1936, H. R. 11662—74th Congress, which bill related exclusively to the regulation of natural gas companies, was introduced. The hearings on this bill were held in April 1936 before a subcommittee of the House Committee on Interstate and Foreign Commerce.

Mr. John E. Benton, then General Solicitor of this Association, testified before this Committee on behalf of the Association in these hearings. His statement contained the following remarks which are particularly pertinent since they were apparently agreed to by the Committee as shown by revisions subsequently made in the bill and by the report later filed by the Committee.

> ". . . The United States Supreme Court has recognized that the distribution of gas locally to consumers either for domestic or industrial use is a local business and may be reached and controlled and regulated by local authorities, municipal and States, as provided by State law, so long as Congress withholds its hand from regulation . . ." (Printed Hearings, page 85).
>
> "Our request is that the Congress in drawing any legislation in this field, shall clearly provide in the Act that it shall not apply to local utility business. This bill appears to have been drawn for the purpose of conforming to that request just as Congress conformed to similar requests in the passage of other Acts within the past two years." (Printed Hearings, page 86.)
>
> "What the State Commissions ask Congress to do, is to regulate interstate intercompany transactions, but not to regulate the rate to any customer whether he takes for industrial or domestic use; to regulate a sale price of gas only when sold for a resale." (Printed Hearings, page 95).

Mr. Benton called attention to the fact that the proviso to Section 1 (b),[4] as it then existed in H. R. 11662, exempted local distribution only if such distribution was in low-pressure mains. (Printed Hearings, page 91). On behalf of the Association he presented a suggested amendment to correct this, so that it would be perfectly clear that any sale to an ultimate customer, whether from a high or low-pressure main, would be exempt from federal regulation, and thus subject to state regulation.

The exact wording of Mr. Benton's proposal was not accepted by the Committee but the Committee made revisions in Section 1 (b) designed to accomplish the same purpose as will be subsequently pointed out. The testimony of all witnesses who touched upon the point was that H. R. 11662 was not intended to encroach in anyway on state jurisdiction but on the contrary, was intended to complement state regulation and to fill the gap in regulation as it then existed. Mr. Dozier A. DeVane, then Solicitor for the Federal Power Commission, made the following statements at the Committee hearing:

> "The whole purpose of this bill is to bring under federal regulation the pipelines and *to leave to the state commissions control of distributing companies and over their rates, whether that gas moves in interstate commerce or not.*" (Printed Hearings, page 24, emphasis supplied).
>
> "The real question we are dealing with here is this: There is a complete hiatus in the regulation of rates charged by these pipe line companies to the local distributors of gas throughout the United States and we are trying to augment State regulation by conferring

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[4] Section 1 (b) of H. R. 11662—74th Congress, provided as follows:

"The provisions of this Act shall apply to the transportation of natural gas in high-pressure mains in interstate commerce and to natural-gas companies engaged in such transportation, but shall not apply to the distribution of natural gas moving locally in low-pressure mains or to the facilities used for such distribution or to the production of natural gas: *Provided*, That nothing in this Act shall be construed to authorize the Commission to fix rates or charges for the sale of natural gas distributed locally in low-pressure mains or for the sale of natural gas for industrial use only."

the authority upon a Federal agency to fix those rates." (Printed Hearings, page 41).

The House Committee, after completing the hearing on H. R. 11662, revised the bill and reintroduced it as H. R. 12680—74th Congress on May 12, 1936. On May 13, 1936, the House Committee on Interstate and Foreign Commerce favorably reported H. R. 12680, Report No. 2651—74th Congress, 2nd Session. H. R. 12680, revised Section 1 (b) as it had been contained in H. R. 11662, in that it omitted all reference to high-pressure and low-pressure mains and provided specifically for federal regulation of sales for resale and for no other regulation of sales. The exact wording of Section 1 (b) as contained in H. R. 12680 was as follows:

> "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale of such gas for resale to the public, and to natural-gas companies engaged in such transportation or sale, but shall not apply to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas: *Provided*, That nothing in this Act shall be construed to authorize the Commission to fix the rates or charges to the public for the sale of natural gas distributed locally or for the sale of natural gas for industrial use only."

The elimination of all reference to high-pressure and low-pressure mains carried out the proposal urged by Mr. Benton at the Committee hearing; namely, that no local distribution was to be subject to Federal regulation regardless of the manner or method of its delivery. The Committee Report to accompany H. R. 12680 contains the following statement:

> "The bill takes no authority from State commissions and is so drawn as to be a complement, and in no sense an usurpation, of State regulatory authority . . ." (page 2)

H. R. 12680 was not acted upon by the 74th Congress but was re-introduced on January 29, 1937 as H. R. 4008—75th Congress. The House Committee on Interstate and Foreign Commerce held hearings on this new bill in March, 1937. H. R. 4008 was never reported out but was reintroduced as H. R. 6586—75th Congress with Section 1 (b) taking the exact form in which it appears in the Act today, which is as follows:

"(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

H. R. 6586 later became the Natural Gas Act. In its report, favorably recommending H. R. 6586, (Report No. 709, 75th Congress, 1st Session), the House Committee said:

"If enacted, the present bill would for the first provide for the regulation of natural-gas companies transporting and selling natural gas in interstate commerce. It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23). There is no intention in enacting the present leg-

islation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission* v. *Attleboro Steam & Electric Co.* (1927) 273 U. S. 83). The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

. . . . .

". . . The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority, and contains provisions for cooperative action with State regulatory bodies."

. . . . .

"Your committee believes that this legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State commissions."

In language, expressly covering the present situation, the Committee forcefully stated:

"That part of the negative declaration stating that the act shall not apply to 'the local distribution of natural gas' is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers *the Commission would have no authority over distribution, whether or not local in character.*" (Emphasis supplied)

The intent of Congress, that the Commission should not have jurisdiction over any local distribution business, could not have been stated in any plainer or more unambiguous words than those emphasized in the above quoted paragraph.

Since the Committee, in its determinations, had before it the decision in the *East Ohio* v. *Tax Commission case, supra,* the conclusion is self-evident that such language expressly excludes any application of that case to the present situation.

When H. R. 6586 reached the floor of the House on July 1, 1937, Congressman Lea, Floor Manager for the bill, repeated the substance of this statement (81 Cong. Rec. 6721). Congressman Wolverton, also a member of the Committee which reported the bill, made substantially the same statement (page 6723).

The Senate Committee on Interstate Commerce held no hearings on H. R. 6586 after it passed the House but reported it favorably on August 9, 1937. The report (Senate Report No. 1162, 75th Congress, 1st Session) merely quotes verbatim the House Committee Report on the same bill. Senator Wheeler, Chairman of the Senate Committee, discussed the bill when it reached the Senate floor on August 19. Pertinent to the questions under consideration, Senator Wheeler said:

> *Mr. Wheeler:* "It (the bill) does not attempt to regulate the producers of natural gas or the distributors of natural gas; only those who sell it wholesale in interstate commerce . . ."
>
> *Mr. Austin:* "Is the bill limited in its scope to the regulation of transportation?"
>
> *Mr. Wheeler:* "Yes, it is limited to transportation in interstate commerce, and it affects only those who sell gas wholesale . . . and let me say to the Senator that, as a matter of fact, the bill does not interfere with state regulation, in any way, shape, or form." (81 Cong. Rec. 9312).
>
> *Mr. Wheeler:* "There is no attempt and can be no attempt under the provisions of the bill to regulate anything in the field except where it is not regulated at the present time. It applies only as to interstate commerce and only to the wholesale price of gas." (81 Cong. Rec. 9313).

The bill did not pass the Senate in 1937 but went over until the following summer when it was passed on July 7, 1938 without further debate and after the adoption of two minor amendments relating to other matters. (83 Cong. Rec. 8347) The bill was approved by the President on June 21, 1938 and became the Natural Gas Act.

As the legislative history clearly shows, the reason for confining regulation under the Act to sales for resale, was the determined purpose of Congress to leave all consumer sales to state regulation.

The judicial interpretation which this Court has placed upon the Natural Gas Act clearly reflects the Congressional intent. In *Illinois Natural Gas Company* v. *Central Illinois Public Service Company*, 314 U. S. 498, the Court said:

> "An avowed purpose of the Natural Gas Act of June 21, 1938, was to afford, through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation." (page 506)

In *Public Utilities Commission* v. *United Fuel Gas Company*, 317 U. S. 456, this Court said:

> "It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry-federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong. 2d Sess. pp. 1-3; H. Rep. No. 709, 75th Cong. 1st Sess. pp. 1-4; Sen. Rep. No. 1162, 75th Cong. 1st Sess." (page 467).

Other judicial expressions by this Court are of a like character:

"We pointed out in *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.*, 314 US 498, 506, 86 L ed 371, 376, 62 S Ct 384, that the purpose of the Natural Gas Act was to provide, 'through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation.' As stated in the House Report the 'basic purpose' of this legislation was 'to occupy' the field in which such cases as *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 US 298, 68 L ed 1027, 44 S Ct. 544, and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 US 83, 71 L ed 549, 47 S Ct. 294, had held the States might not act. H. Rep. No. 709, 75th Cong. 1st Sess. p 2. In accomplishing that purpose the bill was designed to take 'no authority from State commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority.' Id. p 2. And the Federal Power Commission was given no authority over the 'production or gathering of natural gas.' § 1(b).

"The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation which resulted from the Kansas Natural Gas Co. Case and related decisions state commissions found it difficult or impossible to discover what it cost interstate pipe-line companies to deliver gas within the consuming states; and thus they were thwarted in local regulation. H. Rep. No. 709, supra, p. 3. Moreover, the investigations of the Federal Trade Commission had disclosed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies. (S. Doc. 92, Pt. 84-A, c XII, Final Report, Federal Trade Commission to the Senate pursuant to S. Res. No. 83, 70th Cong. 1st Sess.) State Commissions, independent producers, and communities having

or seeking the service were growing quite helpless against these combinations. (S. Doc. 92, Pt. 84-A, c XII, XIII, op. cit., supra, note above) These were the types of problems with which those participating in the hearings were preoccupied. (See Hearings on H. R. 11662, Subcommittee of House Committee on Interstate & Foreign Commerce, 74th Cong. 2d Sess; Hearings on H. R. 4008, House Committee on Interstate & Foreign Commerce, 75th Cong. 1st Sess.) Congress addressed itself to those specific evils." (*Federal Power Commission v, Hope Natural Gas Company*, 320 U. S. 591, 610).

This expression is reaffirmed in *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U. S. 591, 600. In *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U. S. 682, this Court stated:

"In a series of decisions announced prior to the passage of the Act, this Court had held that, although Congress had not acted, the regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional powers of the States. (*Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 US 298, 68 L ed 1027, 44 S Ct. 544 (1924); *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 US 83, 71 L ed 549, 47 S Ct 294 (1927); *State Corp. Commission* v. *Wichita Gas Co.*, 290 US 561, 78 L ed 500, 54 S Ct 321 (1934)). As was stated in the House Committee report, the 'basic purpose' of Congress in passing the Natural Gas Act was 'to occupy this field in which the Supreme Court has held that the States may not act.'" (page 689)

In *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U. S. 507, this court expressed a similar view, saying:

"Shortly then, as the decisions stood in 1938, the states could regulate sales direct to consumers, even though made by an interstate pipeline carrier. This was true of sales not only for domestic and commercial uses but also for industrial consumption, at any rate

whenever the interstate carrier engaged in distribution for all of these uses. On the other hand, sales for resale usually to local distributing companies, were beyond the reach of state power, regardless of the character of ultimate use. This fact not only prevented the states from regulating those sales but also seriously handicapped them in making effective regulation of sales within their authority.

"This impotence of the states to act in relation to sales for resale by interstate carriers brought about the demand for federal regulation and Congress' response in the Natural Gas Act. To reach those sales and prevent the hiatus in regulation their immunity caused, the Act declared in § 1 (b): (Section 1 (b) quoted at this point)

"This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. There were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." (page 514 to 516)

This review of the legislative history of the Act clearly shows that, as stated by Mr. DeVane, *supra:*

> "The whole purpose of this bill is to bring under federal regulation the pipelines and to leave to the state commissions control of distributing companies and over their rates, *whether that gas moves in interstate commerce or not.*" (Emphasis supplied)

The present contention of the Commission is diametrically opposed to the intent of Congress. Congress did not authorize federal regulation of the business of local distribution.

It will be noted that Section 1(b), as originally proposed in H. R. 11662—74th Congress, provided for the exemption of "natural gas moving locally in low-pressure mains." Following the suggestion of Mr. Benton, all reference to

type or character of mains was eliminated in subsequent bills and in the final enactment of Section 1 (b). The legislators, by this action, provided for exemption of just those operations of East Ohio, which the Commission now claims subjects East Ohio to Commission jurisdiction.

It is plain that Congress intended to declare the need for federal regulation only to those matters which were not subject to regulation by the states; and it followed that intent by declaring, in Section 1 (b) that the Commission shall not have jurisdiction over "local distribution of natural gas or to the facilities used for such distribution." The attempted extension of federal jurisdiction present in the instant case, and based on vague and implied powers, should be rejected by this Court. It is a well-settled principle that supersedure of state power by federal power cannot be implied but must be plainly and positively expressed. *Palmer* v. *Massachusetts*, 308 U. S. 79; *Kelly* v. *Washington*, 302 U. S. 1.

(c) *The Construction Which Has Been Placed Upon Analogous Provisions of the Federal Power Act Establishes Such Exemption*

The operations of East Ohio do not present an isolated and unique situation. East Ohio is subject to complete regulation by the Ohio Commission. There is no gap or hiatus in their operations which requires the intervention of federal regulatory authority. The Commission, itself, in its petition for a writ of certiorari in the present case points out that 43 similar cases are now pending before it. Undoubtedly, throughout the nation there are hundreds of local distributing companies, subject to complete regulation by the respective state commissions, who receive out-of-state gas from interstate pipe line companies. This, then, presents an alarming picture. If the Court were to sustain the contention of the Commission as to East Ohio, serious encroachment on state authority throughout the nation would result. The Natural Gas Act envisioned no such

horrific result—it was intended to supplement, not supplant, state regulation.

In the enactment of the Natural Gas Act, Congress was but following a settled policy of respecting the jurisdiction found to be exercised by the state commissions. In 1929 the state commissions, at the Annual Convention of the National Association of Railroad and Utilities Commissioners, adopted a resolution as follows:

> "*Resolved*, That, whereas under the principle established by the decision of the United States Supreme Court in *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23, state authorities, in the absence of federal legislation, retain power to regulate local service of utilities which operates across state lines, including the rates for such service, this Association asks Congress not to interfere with the continued exercise of that power as to any class of public utilities by legislation vesting power to regulate such service and rates in any federal tribunal." (Proceedings, 41st Annual Convention, Natl. Assn. of R. R. & Util. Comm'rs., page 369).

This resolution was presented to the Congress from time to time when bills providing for federal utility regulation were under consideration. Congress complied with the request contained in this resolution.

Section 221 of the Communications Act of 1934 explicitly provides that nothing in the Act shall be construed to give the Federal Commission jurisdiction with respect to wire telephone exchange service "even though a portion of such exchange service constitutes interstate or foreign commerce, in any case where such matters are subject to regulation by a state commission or by local governmental authority."

Section 201 (a) of the Federal Power Act, approved August 26, 1935, limits the jurisdiction of the Federal Power Commission in such fashion that it does not extend to any sale of power to a consumer.

It thus appears that, in conformity with the general plan of our government, under which matters of local concern, which do not so affect the interest of the states generally as to require federal control, are left to be dealt with by the states; control over the sale of gas, of electric energy, and of exchange telephone service, has been claimed by the states and has been recognized and respected by the Congress.

The striking fact, developed by a study of all the Supreme Court decisions bearing on the subject, is that not once has the Supreme Court failed to sustain state regulation or taxation of sales to ultimate consumers of whatever kind or character. As Professor Thomas Reed Powell has said in his exhaustive survey of the cases (Harvard Law Review, Vol. LVIII, No. 7, 1945, page 1082):

> ". . . the Supreme Court has from the beginning allowed the state both to tax and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if this first sale is also necessarily the last sale because consummated by consumption . . ."

It is also true that the trend of recent Supreme Court decisions runs in favor of sustaining state authority. As this court very recently said in *Prudential Insurance Co.* v. *Benjamin*, *supra:*

> ". . . the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce . . ." (page 420)

The close similarity between the situation involved in the present case arising under the Natural Gas Act and the case of *Connecticut Light and Power Company* v. *Federal Power Commission*, 324 U. S. 515, arising under the Federal Power Act, is especially noteworthy. The *Connecticut case* involved the use of electric power lines for the transmission of energy to points of local distribution, whereas,

the present case involves the transmission of gas by pipe line to points of local distribution. The statutory background of the *Connecticut case* is similar to that of the present case. Section 201 (b) of the Federal Power Act provides as follows:

> "The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State Commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

Section 201 (e) provides:

> "The term 'public utility' when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this part."

The Supreme Court in the *Connecticut case* sustained, in effect, the state regulatory authority and in language very applicable to the present situation, discussed the meaning of the phrase, "facilities used in local distribution". At page 530 of that decision, the Court stated:

> "But whatever reason or combination of reasons led Congress to put the provision in the Act, we think it meant what it said by the words 'but shall not have jurisdiction, except as specifically provided in this Part or the Part next following . . . over facilities used in

local distribution.' Congress by these terms plainly was trying to reconcile the claims of Federal and of local authorities and to apportion Federal and state jurisdiction over the industry. To define the scope of state controls, Congress employed terms of limitation perhaps less scientific, less precise, less definite than the terms of the grant of Federal Power. The expression 'facilities used in local distribution' is one of relative generality. But as used in this Act it is not a meaningless generality in the light of our history and the structure of our government. We hold the phrase to be a limitation of jurisdiction and a legal standard that must be given effect in this case in addition to the technological transmission test.

"Nor do we think the exemption of 'facilities used in local distribution' exempts only those which do not carry any trace of out-of-state energy. Congress has said without qualification that the Commission shall not, unless specifically authorized elsewhere in the Act, have jurisdiction 'over facilities used in local distribution.' To construe this as meaning that, even if local, facilities come under jurisdiction of the Federal Power Commission because power from out-of-state however trifling, comes into the system, would nullify the exemption and as a practical matter would transfer to Federal jurisdiction the regulation of many local companies that we think Congress intended to leave in state control. It does not seem important whether out-of-state energy gets into local distribution facilities. They may carry no energy except extra-state energy and still be exempt under the Act. The test is whether they are local distribution facilities. There is no specific provision for Federal jurisdiction over accounting except as to 'public utilities'. The order must stand or fall on whether this company owned facilities that were used in transmission of interstate power and which were not facilities used in local distribution."

This construction which the Court has placed upon the analogous provisions of the Federal Power Act, is certainly pertinent to the matter now under review, and as such, establishes the exemption of East Ohio from the regu-

latory authority of the Commission. This Court further stated in the *Connecticut case:*

> "In so far as the Commission found in these cases a rule of law which excluded from the business of local distribution, the process of reducing energy from high to low voltage in subdividing it to certain ultimate consumers, the Commission has misread the decisions of this court. No such rule of law has been laid down."

This statement is equally applicable to the reduction of natural gas from high pressure mains to low-pressure mains in subdividing it to serve ultimate consumers. As stated by the court, this process is not excluded from the business of local distribution. The present facilities of East Ohio, therefore, do not constitute a sufficient basis for the exercise of federal jurisdiction.

CONCLUSION.

It cannot be too strongly emphasized that no question of federal power is presented here. This case, as with *Federal Trade Commission* v. *Bunte Bros.,* 312 U. S. 349, 355, "presents the narrow question of what Congress did, not what it could do." The extension of federal control into traditionally local domains is a "delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions." *Palmer* v. *Massachusetts,* 308 U. S. 79, 84. This Court has insisted on a "suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear." *Florida* v. *United States,* 282 U. S. 194, 211. And, as said in *City of Yonkers* v. *United States,* 320 U. S. 685:

> ". . . where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control the existence of federal authority

to act should appear affirmatively and not rest on inference alone."

That the Ohio Public Utilities Commission has both constitutional and statutory power to regulate every phase of East Ohio's operations is not questioned. That allowance of Federal Power Commission jurisdiction over East Ohio's accounting practices will produce overlapping Federal-State regulation, and result in an increased burden on consumer rate-payers, cannot be denied. That such overlapping regulation, in this case where the state is fully competent to act, violates the express language of the Act and the intent of Congress in framing the Act, is obvious.

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted on behalf of the Indiana Public Service Commission, the Michigan Public Service Commission, the Wisconsin Public Service Commission and the National Association of Railroad and Utilities Commissioners, amici curiae.

Walter R. McDonald,
Austin L. Roberts, Jr.,
Attorneys for said State Commissions and said Association.

November 2, 1949.

IN THE

Supreme Court of the United States

OCTOBER TERM 1949—No. 71.

FEDERAL POWER COMMISSION,
Petitioner,

vs.

THE EAST OHIO GAS COMPANY,
STATE OF OHIO,
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

BRIEF FILED ON BEHALF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*.

GEORGE H. KENNY,
Assistant Counsel to the Public Service Commission of the State of New York, as Amicus Curiae.

SHERMAN C. WARD,
Acting Counsel to the Public Service Commission of the State of New York,
Of Counsel.

The Governor Alfred E. Smith
State Office Building,
Albany 1, New York.

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Respondents.

BRIEF FILED ON BEHALF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*.

Preliminary Statement.

This case involves an attempt by the Federal Power Commission to exercise regulatory powers in respect to a local intrastate utility company engaged exclusively in the business of distributing and selling natural gas at retail to ultimate consumers, wholly within the State of Ohio.

NOTE: The petitioner, Federal Power Commission, will sometimes be referred to as "the Commission" and the respondent, East Ohio Gas Company, will be referred to as "East Ohio." Emphasis in quotations is supplied unless otherwise indicated.

The Natural Gas Act was not intended to endow the Commission with regulatory powers over such a company. On the contrary, it was intended to reserve to the states the exclusive jurisdiction to regulate such local distributing companies.

The Public Service Commission of the State of New York is the agency and instrumentality of the State of New York having broad regulatory jurisdiction over gas companies, and over the operations, properties and activities of such companies in the State of New York, under Article 4, §§64-77, and other provisions, of the New York Public Service Law (L. 1910, ch. 480, as amended). Section 5 of the Public Service Law provides, in part:

> "The jurisdiction, supervision, powers and duties of the public service commission shall extend under this chapter. * * *
>
> 2. To the manufacture, conveying, transportation, sale or distribution of gas (natural or manufactured or mixture of both) * * * for light, heat or power, to gas plants * * * and to the persons or corporations owning, leasing or operating the same."

The Public Service Commission of the State of New York believes that the assertion by the Federal Power Commission of jurisdiction over East Ohio in this case constitutes an attempted encroachment upon the powers of the states to regulate their local gas distributing companies, which powers were intended to be reserved to the states under the provisions of the Natural Gas Act.

Accordingly this brief is filed on behalf of the Public Service Commission of the State of New York, as *amicus curiae,* pursuant to subdivision 9 of Rule 27 of the Rules of this Court.

Opinions Below.

The opinion of the Commission is reported at 74 PUR (NS) 256. The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 173 F. 2d 429.

Question Presented.

The question in which the Public Service Commission of the State of New York is interested is the following:

Whether, under the provisions of the Natural Gas Act, an intrastate public utility company, engaged exclusively in the business of distributing and selling gas at retail to ultimate consumers within a single state, is subject to the broad regulatory powers of the Federal Power Commission simply because natural gas, originating outside of such state, is purchased and received by the company within the state (i. e. at the state line) and is transported by the company through its own high pressure "transmission" mains for some distance within the state, for the sole purpose of serving the local retail consumers of such company.

Statement of the Case.

A. The Facts.

The detailed facts of this case are set forth in the briefs of the parties and in the opinion of the Court below and for the sake of brevity we shall not repeat them. However, we wish to emphasize the following undisputed facts, as stated by the Court below.

> "* * * it is certain that all property and facilities owned and operated by East Ohio lie within the physical boundaries of the State of Ohio, that East

Ohio distributes natural gas in Ohio by means of an extensive pipeline system, and that none of East Ohio's pipelines crosses state lines. Further, it is uncontroverted that [East Ohio] makes no sales of any kind to any other company for resale purposes and that none of the gas sold by [East Ohio] is consumed outside of Ohio, that is, none of the gas in the pipelines of East Ohio flows out of the State of Ohio" (173 F. 2d at p. 430).

Also, as pointed out by the Court below, East Ohio "has long been subject to complete regulation by the Public Utilities Commission of Ohio," and:

> "There can be little doubt that [East Ohio] is now and has been very thoroughly and completely regulated by the Ohio Commission" (173 F. 2d at p. 431).

B. The Determination of the Commission.

Despite the fact that the sole *raison d'etre* of East Ohio is the local distribution of natural gas for retail sale to ultimate consumers, except for which it would have no use for any facilities whatever, the Commission held that the "transmission" lines of East Ohio, by which it transports its own gas, within the State of Ohio, solely for the purpose of its own business of local distribution and sale of such gas to ultimate consumers, "are not 'facilities used for' local distribution"; but are facilities used for "the transportation of natural gas in interstate commerce" within the meaning of Section 1(b) of the Natural Gas Act and, therefore, that East Ohio is a "natural gas company" within the meaning of the Act.

The Commission said:

> "In arriving at this conclusion we recognize fully the intention of Congress, as expressed in §1(b) of the Natural Gas Act, that *local distribution of natural*

> *gas and the facilities used therefor shall be exempt* from the jurisdiction of this Commission" (74 PUR (NS) at p. 263).

It is apparent, however, that the Commission did *not* give recognition to the conceded intention of the Congress, but attempted to do that which it disclaimed, viz.: to invade "the field of local regulation which the Congress has clearly reserved to the states" (74 PUR (NS) at p. 263).

C. The Decision of the Court Below.

The United States Court of Appeals for the District of Columbia Circuit correctly held that East Ohio "is not engaged in the transportation of natural gas in interstate commerce within the meaning of the Act" and that "it is engaged *solely* in the local distribution of natural gas to local consumers" (173 F. 2d at p. 433, italics by the Court). After pointing out that the Natural Gas Act was intended only "to fill in the gap" in regulation, as defined by the previous decisions of this Court, by supplementing state regulation with federal control of activities which were beyond the scope of state power, the Court below said in part:

> "All of the gas coming to East Ohio from out of state, gas furnished primarily by Hope and Panhandle, is already completely subject to federal regulation and comes to East Ohio at a rate set by the federal commission. There is thus obviously no gap in regulation in this case and the attempted assumption of jurisdiction by the federal commission in this instance, far from supplementing and reinforcing, constitutes unnecessary, undesirable and unintended usurpation of state regulatory authority which cannot be justified by either the terms of [the] Act or its legislative history" (173 F. 2d at p. 434).

Circuit Judge Edgerton dissented upon the authority of *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U. S. 465, decided in 1930, in which case it was held that the business conducted by East Ohio is "a business of purely local concern exclusively within the jurisdiction of the state" (283 U. S. at p. 471).

The decision of the majority of the Court below is eminently correct and should be affirmed by this Court.

Summary of Argument.

I.

The Natural Gas Act was not intended to subject local intrastate distributing companies, such as East Ohio, to the broad regulatory jurisdiction of the Federal Power Commission.

II.

East Ohio is not a "natural gas company." It is not engaged in the "transportation of natural gas in interstate commerce" within the meaning of the Natural Gas Act, but is engaged solely in local distribution, and its property and activities are specifically exempted from the jurisdiction of the Federal Power Commission.

III.

Extension of the Commission's jurisdiction under the Natural Gas Act to include East Ohio and others similarly situated would open up a vast new field of Federal regulation and would usurp existing state power, contrary to the intent of the Act.

ARGUMENT.

POINT I.

The Natural Gas Act was not intended to subject local intrastate distributing companies, such as East Ohio, to the broad regulatory powers of the Federal Power Commission.

A. The Act was not intended to occupy the entire natural gas field to the limit of constitutional power.

> "Without entering upon another review of its legislative history, suffice it to say that the Natural Gas Act *did not envisage federal regulation of the entire natural gas field to the limit of constitutional power.* Rather it contemplated the exercise of federal power as specified in the Act, *particularly in that interstate segment which the states were powerless to regulate* because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies" (*Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498, 502-3).

See also:

> *Panhandle Eastern Pipe line Co.* v. *Public Service Commission,* 332 U. S. 507, 519.

B. The Act was intended only to fill the hiatus in regulation with reference to wholesale distribution and sales.

Indisputably the primary purpose of the Natural Gas Act, as the Court below said, was to "fill in the gap" in regulation which had existed under the decisions of this

Court in respect to sales of natural gas at wholesale in interstate commerce.

> "Suffice it to say that by 1938 the Court had delineated broadly between the area of permissible state control and that in which the states could not intrude. The former included interstate direct sales to local consumers, as exemplified in *Pennsylvania Gas Co.* v. *Public Service Commission,* 252 U. S. 23; the latter, service interstate to local distributing companies for resale, as held in *Missouri* v. *Kansas Gas Co.,* 265 U. S. 298, reinforced by *Public Utilities Comm'n.* v. *Attleboro Co.,* 273 U. S. 83" (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission,* 332 U. S. 507 at p. 514).

The constitutional inability of the states to regulate interstate sales at wholesale left a well defined hiatus in the regulation of such sales of gas and electricity, which both the Natural Gas Act and the 1935 amendment to the Federal Power Act were designed to fill.

> *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission,* 332 U. S. 507;
> *Jersey Central Power & Light Co.* v. *Federal Power Commission,* 319 U. S. 61, 67-68;
> *Connecticut Light & Power Co.* v. *Federal Power Commission,* 324 U. S. 515, 524.

> "This impotence of the states to act *in relation to sales for resale by interstate carriers* brought about the demand for federal regulation and Congress' response in the Natural Gas Act" (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission,* 332 U. S. at p. 516).

In the carrying out of this purpose, Congress was very careful to supply the needed control only within the limits

of the hiatus in respect to the *wholesale* distribution of natural gas moving interstate (including regulation of the rates for its transportation and for its sale at wholesale), without overlapping of regulatory functions properly within the scope of state power. Thus in the *Panhandle Eastern Pipe Line Company* case, *supra,* the Court held that the Natural Gas Act had not superseded the regulatory power of the states over sales of natural gas at retail, and of the rates to be charged therefor, even though the sales in that case were made by an interstate pipe line carrier and were sales in interstate commerce.

C. The regulation of companies engaged in the "transportation of natural gas in interstate commerce" was intended to implement Federal regulation of wholesale distribution and sales.

The prime purpose of the Act being to regulate interstate sales of natural gas at wholesale, it is apparent that the provisions of the Act relating to the "transportation of natural gas in interstate commerce" were designed to implement the regulation of such sales by the Commission. This design is made clear by the declaration of policy contained in Section 1(a) of the Act, wherein it is declared:

> "that the *business* of transporting *and* selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas *and the sale thereof* in interstate and foreign commerce is necessary in the public interest."

Under the Act, the Commission was to be the "agency for regulating *wholesale distribution to public service companies* of natural gas moving interstate" (*Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 506). The Commission's regulatory powers under the Act were designed to relate to such interstate business (in

which East Ohio is not engaged) and particularly to assist the Commission in the exercise of its prime function of fixing the wholesale rates.

> "The fixing of 'just and reasonable' rates (§4) with the *powers attendant thereto*, was the heart of the new regulatory system" (*Federal Power Commission* v. *Hope Natural Gas Co.* 320 U. S. 591, 611).

In respect to the "transportation of natural gas in interstate commerce," the plain intent of the Congress was to enable the Commission to exercise broad regulatory powers over companies engaged in the transportation of natural gas *antecedent* to final wholesale sales and delivery of such gas to local intrastate distributing companies. The same purpose is found in the Federal Power Act, relating to the regulation of interstate electric companies. Thus in *Jersey Central Power & Light Co.* v. *Commission*, 319 U. S. 61, where electric energy produced in New Jersey by Company A was delivered to Company B in New Jersey, and thence by an interconnection found its way to Company C in New York, jurisdiction of the Federal Power Commission over Company B was upheld. This Court said:

> "The purpose of this act was *primarily to regulate the rates and charges of the interstate energy.* If intervening companies might purchase from producers in the state of production, free of federal control, cost would be fixed *prior to the incidence of federal regulation and federal rate control would be substantially impaired,* if not rendered futile." (319 U. S. at pp. 71-72.)

Similarly, in *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, the Court held that sales of gas by a "natural gas company" (concededly subject to the act), to three interstate pipeline companies for transportation, resale and ultimate consumption in other states,

constituted sales "in interstate commerce" within the meaning of the Act. The Court specifically referred to the *Jersey Central* Case (p. 688) and finally said (p. 693):

> "Unreasonable charges exacted *at this stage of the interstate movement* become perpetrated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid *such situations* that the Natural Gas Act was passed."

D. No Federal purpose intended to be implemented by the Act would be served by the exercise of the asserted jurisdiction over East Ohio.

East Ohio is not engaged in the "wholesale distribution * * * of natural gas moving interstate" (*Illinois Natural Gas Company* case, *supra*), and none of its properties or activities are devoted to such business intended to be regulated by the Natural Gas Act.

East Ohio does not sell any of the out-of-state gas to any other person or company for resale. It does not transport natural gas for any other person, and does not hold itself out as being willing to undertake such service. Upon delivery of the out-of-state gas to East Ohio, at the state line, the "incidence of federal regulation" (*Jersey Central* case, *supra*) has passed. All previously incurred "fixed items of cost" presumably are subjected to scrutiny by the Federal Power Commission, and are encompassed in the wholesale rates paid by East Ohio, which rates are fully subject to regulation by the Federal Power Commission (cf. *Interstate Natural Gas* case, *supra*). All costs incurred by East Ohio from the point of delivery of the out-of-state gas are fully subject to scrutiny and regulation by the Ohio Commission when it fixes the retail rates charged by East Ohio.

In *Connecticut Light & Power Co.* v. *Commission,* 324 U. S. 515, the Court refused to sustain an order of the Federal Power Commission exercising jurisdiction over an intrastate distributing company engaged in the local distribution of electricity originating in another state. The Court referred to the *Jersey Central* case, *supra,* and distinguished it, in part, as follows:

> "We held that the 'primary purpose' of the 1935 amendments to the Power Act was to give the Power Commission control of sales of energy across state lines which had been held to be beyond the control of the state of export in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.,* 273 U. S. 83. Here, however, the federal authority to fix the sale price of the energy coming from Massachusetts in interstate commerce attaches and presumably has been or at least may be exercised pursuant to the *Jersey Central* holding *before the energy reaches this company. What petitioner does or fails to do is only after the incidence of federal regulation and can in no way frustrate it*" (324 U. S. at p. 524).

It is respectfully submitted that this rationale is directly applicable to the present case and that no federal purpose intended by the Natural Gas Act would be served by permitting the Commission to exercise the asserted jurisdiction over East Ohio.

The attempt of the Commission in its brief (pp. 42-49) to bolster its argument by reference to "the manner in which the Act would apply to respondent," under the provisions of Sections 5(b) and 7(a), (b) and (c) of the Act is futile for various reasons. Mention of only one will suffice. Each of said provisions endows the Commission with regulatory power only in respect to a "natural-gas company." The Commission might have referred to many

other provisions of the Act which *would* be applicable to East Ohio if it *were* a "natural-gas company." But the very point at issue in this case is *whether East Ohio is a "natural-gas company."* As this Court has said in rejecting a similar contention of the Commission: "The argument begs the question."

> *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498, 509;
> *cf. Connecticut Light & Power Co.* v. *Federal Power Commission,* 324 U. S. 515, 535.

POINT II.

East Ohio is not a "natural-gas company." It is not engaged in the "transportation of natural gas in interstate commerce" within the meaning of the Act, but is engaged solely in local distribution, and its properties and activities are specifically exempted from the jurisdiction of the Commission.

The regulatory provisions of the Natural Gas Act are applicable to East Ohio only if it is a "natural-gas company." Section 2(6) of the Act defines a "natural-gas company" as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." Section 2(7) of the Act defines "interstate commerce," in part, as "commerce between any point in a state and any point outside thereof." Under Section 1(b) of the Act as construed by this Court, the regulatory power of Congress attached to only three things. "These were (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale" (*Panhandle East-*

ern Pipe Line Co. v. *Public Service Commission*, 332 U. S. 507, 516).

The prime purpose of the Act, to regulate wholesale service and sales of natural gas in interstate commerce, is inapplicable to East Ohio. Concededly, East Ohio makes no sales "in interstate commerce for resale." All of its sales of natural gas are retail sales to ultimate consumers. None of them is subject to regulation by the Commission; under the *Panhandle Eastern Pipe Line* decision, *supra*, all such sales are fully subject to regulation by the State of Ohio.

East Ohio would be subject to the regulatory power of the Commission only if it were engaged in "the transportation of natural gas in interstate commerce," within the meaning of the Act. But East Ohio is not engaged in any such activity. East Ohio merely transports its own natural gas (purchased from others who had transported the gas in interstate commerce and sold the same to East Ohio at rates subject to regulation by the Commission) wholly within the State of Ohio, in the exercise of its sole function of distributing and selling natural gas at retail for local consumption in the State of Ohio.

The activities and properties of East Ohio fall squarely within the exemption contained in Section 1(b) of the Act:

> "The provisions of this act * * * shall not apply to *any other transportation* or sale of natural gas or to the *local distribution* of natural gas or to the *facilities used for such distribution* or to the production or gathering of natural gas."

In urging upon this Court an expansion of the jurisdiction of the Commission to embrace East Ohio, the Commission indulges in narrow legalistic reasoning which, blind to the background, legislative history and clear pur-

poses of the Act, and the decisions of this Court thereunder, could only lead to an unreasonable and improper result unintended by the Congress. The Commission reasons that here we have a "transportation" of natural gas; the mains are large, the pressure is high, the flow of gas is uninterrupted—an engineer or accountant would classify the operation as a "transmission." By reference to these same mechanical tokens, the Commission would have the Court conclude that the gas is transported by East Ohio "in interstate commerce," within the meaning of the Act.

In taking its stand the Commission has not only disregarded the admonition of this Court that in the construction of Section 1(b) "we should not lose sight of the objectives sought to be accomplished by Congress in passing the Natural Gas Act" (*Interstate Natural Gas Co. v. Commission*, 331 U. S. 682, 689) but the Commission has further disregarded the rejection by the Court of these merely mechanical considerations in determining the character of a transportation of natural gas.

> "Those merely mechanical considerations are no longer effective, if ever they were exclusively, to determine for regulatory purposes the interstate *or intrastate* character of the continuous movement and resulting sales we have here" (*Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507, 512).

The important considerations and, we submit, the decisive considerations in the present case, are that the out-of-state gas is delivered to East Ohio, a local distributing company, at the state line, and thereafter the activities of East Ohio pertain exclusively to the local distribution of the gas for retail consumption wholly within the state and are

not within the scope of any intended purpose for which the Natural Gas Act was enacted.

All interstate business in the statutory sense ceases upon the sale and delivery of the out-of-state gas to East Ohio *at the state line.* From thenceforth no further transaction occurs which may properly be characterized as "commerce," or as a "transportation in interstate commerce" within the meaning of the Act. From that point East Ohio merely uses its own facilities for conveying its own gas in the furtherance of its own business of local distribution and sale of natural gas to ultimate consumers within the State of Ohio. Even before the enactment of the Natural Gas Act this Court had recognized that the interstate character of such a movement of gas may properly be said to cease "with the delivery of the gas to the distributing companies."

> *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 308;
> *cf. Public Utilities Comm.* v. *Landon,* 247 U. S. 236, 245;
> *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 504.

It is strange that after a lapse of over ten years since the enactment of the Natural Gas Act, the Commission and the dissenting Justice in the Court below have been compelled to place principal reliance for their position upon *East Ohio Gas Co.* v. *Tax Commission of Ohio,* 283 U. S. 465, decided long before such enactment. That case lends them no support whatever, for the following reasons: (1) The case related solely to the constitutional power of the State to tax the business of East Ohio. (2) The Court held that the State could impose the tax since the furnishing of gas by East Ohio to its consumers "is not interstate commerce but a business of purely local concern exclusively within

the jurisdiction of the State" (p. 471). (3) The statements of the Court with reference to the character of the transportation of gas in East Ohio's high pressure mains were pure *dicta.* As later pointed out, the Court was not "required to determine the exact point at which interstate commerce ceased and intrastate commenced" (*Connecticut Light & Power Co.* v. *Commission,* 324 U. S. 515, 534). (4) The merely mechanical tests referred to in that case have been specifically disapproved by this Court (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission,* 332 U. S. 507, 512). (5) The Court expressly rejected the reliance of the Commission upon that case in the *Connecticut Light & Power* case, when it said:

> "But a holding that distributing gas at low pressure to consumers is a local business *is not a holding that the process of reducing it from high to low pressure is not also part of such local business.* In so far as the Commission found in these cases a rule of law which excluded from the business of local distribution the process of reducing energy from high to low voltage in subdividing it to serve ultimate consumers, *the Commission has misread the decisions of this Court. No such rule of law has been laid down*" (324 U. S. at p. 534).

In the *Connecticut Light & Power Co.* case, *supra,* the Commission, upon the basis of purely mechanical considerations, sought to expand its jurisdiction under the Federal Power Act, to include local electric distributing companies receiving and distributing out-of-state energy. This Court held that Congress "meant what it said by the words 'but should not have jurisdiction, except as specifically provided in this Part and the Part next following . . . over *facilities used in local distribution.*'" The Court rejected

the construction of the Federal Power Act sought by the Commission, pointing out that:

> "as a practical matter [it] would transfer to federal jurisdiction the regulation of many local companies that we think Congress intended to leave in state control" (p. 531).

A proper analysis of the provisions of the Natural Gas Act, their legislative history as outlined in the briefs of the parties, and the clear purposes of the Act as enunciated in the decisions of this Court, can only lead to a similar conclusion. East Ohio is not engaged in the "transportation of natural gas in interstate commerce" and is not a "natural-gas company" within the meaning of the Act. East Ohio is engaged solely in the local distribution of natural gas in the State of Ohio and its properties and activities are expressly exempted from the jurisdiction of the Commission. Any other conclusion would inevitably result in improper encroachment upon the regulatory powers of the states contrary to the intent of the Congress embodied in the Act.

POINT III.

Extension of the Commission's jurisdiction under the Natural Gas Act to include East Ohio and others similarly situated would open up a vast new field of Federal regulation and would usurp existing state power, contrary to the intent of the Act.

The Federal Power Commission has not been made the general guardian of the public interest in the natural gas field. Under the Natural Gas Act it has been endowed with extremely broad regulatory powers, but only in respect to

interstate "natural-gas companies." The Congress did not intend that such powers should be exercised in respect to intrastate local distributing companies such as East Ohio. On the contrary it was intended that state control of such companies and their activities should remain unimpaired.

The Commission has not hitherto attempted generally to impose its full regulatory powers upon such local gas distributing companies.* Although the Natural Gas Act has been in effect for over ten years, this is the first time that the precise issues here involved have come before this Court. We have no knowledge of statistics which might show the number of local distributing companies throughout the country which would become subject to the broad regulatory powers of the Commission if its asserted jurisdiction were to be upheld in this case. Obviously there must be a great many.†

The effect of reversal of the decision of the Court below would be to completely transform the essential nature and

* The Commission cites only a few sporadic instances involving partial exercise of its claimed statutory authority (under § 7 of the Act) in similar situations (brief p. 42, n. 23).

† The Commission has very recently asserted jurisdiction over the great manufactured gas companies operating in New York City which propose to receive natural gas within the State of New York, after the completion of its interstate journey, and to utilize such gas for mixing with manufactured gas solely for local distribution to ultimate consumers. On October 27, 1949 the Commission reversed a decision of its Examiner and held (with one Commissioner dissenting) that Consolidated Edison Company of New York, Inc., The Brooklyn Union Gas Company and Kings County Lighting Company, will each become a "natural gas company" under the Natural Gas Act, upon the completion of construction and commencement of operation of certain proposed facilities comprising about 38 miles of pipe line, wholly within the City of New York (F. P. C. Opinion No. 181, Docket Nos. G-1167, G-1171, G-1190). We do not concede that in the event of a reversal in the present case, such decision would govern said New York City cases. However, said cases illustrate the lengths to which the Federal Power Commission is going in attempting to expand its jurisdiction over local distributing companies under the theories advanced in the present case.

character of such companies and their activities. They would *ipso facto* lose their status as local distributors and become interstate carriers. Under the provisions of Section 7(a) of the Natural Gas Act the Commission would be empowered to direct them "to extend or improve [their] transportation facilities." In addition under Section 7(a) the Commission would be authorized to direct any such company "to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public." Thus the door would be opened to compulsory expansion of the activities of such companies to encompass "the sale in interstate commerce of natural gas for resale," a business for which such companies were not organized and in which they are not engaged. No such complete transformation of the character and activities of local distributing companies was envisaged by the Congress in enacting the Natural Gas Act.

The exercise by the Federal Power Commission of broad regulatory powers in respect to such local distributing companies (including, among others, the regulation of accounts and accounting involved in the present case) would in many instances duplicate the exercise by the state commissions of their normal regulatory functions under state laws and would greatly increase the possibilities of conflicts of jurisdiction, as well as of decisions, in respect to the same subject matter. Such interference with the regulatory powers of the states may be a necessary concomitant where it is required in order to carry out the proper purposes of the Natural Gas Act. Where no intended purpose of the Natural Gas Act is to be served, such interference is unwarranted.

Under the circumstances of the present case no federal purpose intended by the Natural Gas Act would be implemented by extending the jurisdiction of the Commission to cover East Ohio and other companies similarly situated. In this case, all purposes of the Act will have been fully subserved by the Commission's regulation of the interstate transportation of natural gas to the Ohio state line and by its regulation of the wholesale rates at which the gas is purchased by East Ohio. Upon receipt of the gas by East Ohio at the Ohio state line, the "incidence of federal regulation" has passed, and what East Ohio "does or fails to do" thereafter "can in no way frustrate" the federal regulation intended by the Act (*Connecticut Light & Power Co.* v. *Commission,* 324 U. S. 515, 524).

This case finds its direct parallel in the situation presented to this Court in the *Connecticut Light & Power* case. There, as here, the Federal Power Commission, by the application of purely mechanical and technological tests, and without reference to the intended policy of the Federal Power Act, sought to bring within the purview of its jurisdiction a large class of local electric distributing companies. The decision in that case, we believe, effectively blocked an unwarranted expansion of the Commission's activities in the field of electric utilities. Only a similarly restrictive decision by the Court in the present case will prevent an unwarranted expansion of the Commission's activities in the natural gas field and the concomitant encroachment upon state control of local gas distributing companies.

> "The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and

reinforce it in the gap created by the prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way" (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission,* 332 U. S. at p. 507, 517-518).

The claim advanced by the Commission in its brief that East Ohio falls within the gap in regulation which the Act was designed to fill, is wholly illusory. The decision of the Court below leaves no hiatus in regulation with respect to any property or activities of East Ohio. In the words used by this Court in the *Panhandle Eastern* case (p. 524) "The attractive gap which appellant has envisioned in the coordinate schemes of regulation is a mirage."

Conclusion.

The decision and judgment of the Court below are correct and should be affirmed.

Respectfully submitted,

George H. Kenny,
Assistant Counsel to the Public Service Commission of the State of New York, as Amicus Curiae.

Sherman C. Ward,
Acting Counsel to the Public Service Commission of the State of New York, Of Counsel.

The Governor Alfred E. Smith
State Office Building,
Albany 1, New York.

November 1, 1949.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 71

FEDERAL POWER COMMISSION, *Petitioner*,

v.

THE EAST OHIO GAS COMPANY, ET AL., *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Memorandum in Support of Petitions for Rehearing Submitted on Behalf of the Louisiana Public Service Commission, Amicus Curiae.

To the Honorable the Supreme Court of the United States:

Comes now Bolivar E. Kemp, Jr., Attorney General of Louisiana, appearing herein for the Louisiana Public Service Commission, *amicus curiae*, and submits this memorandum in support of the petitions for rehearing presented by the Respondents in the above-

entitled cause, and, in support thereof, respectfully shows:

1. The Louisiana Public Service Commission is an agency of the State of Louisiana, charged with the intrastate regulation of public utilities including natural gas companies. The Commission is greatly alarmed and concerned over the consequences of the majority decision in this cause with its resulting broadening and expansion of the authority of the Federal Power Commission, which can only have the effect of embarrassing and inhibiting effective regulation of natural gas utilities by the several states.

2. The majority opinion appears to rest primarily upon the mechanical circumstance that when respondent receives the gas from the transcontinental pipe lines of Panhandle Eastern Pipe Line Company and Hope Natural Gas Company, at points within the State of Ohio, there is no immediate reduction in the pipe line pressure, but such pressure is permitted to propel the gas through the trunk lines of East Ohio Gas Company to ultimate destination without repumping. From this the majority seems to infer that the interstate journey of the gas is not broken at the point of reception by East Ohio Gas Company, but continues to the point at which pressures are reduced for the purpose of actual service to consumers.

That this interpretation was not the intent of the Congress is made clear by the legislative history of the Natural Gas Act. One of the early bills which subsequently led to the enactment of this statute was H. R. 11662, introduced in the 74th Congress. Section 1 (b) of H. R. 11662 included a provision which exempted local distribution of gas from federal jurisdiction *only if such distribution was from low-pressure mains.* The Louisiana Public Service Commission, in concert with the other state regulatory commissions which compose the membership of the National Association of Railroad and Utilities Commissioners, protested this provision and urged that the section be amended to make it perfectly clear that any distribution to ultimate consumers, regardless of gas pressures, would be free of federal regulation and subject to regulation by the states. This is reported at Page 91 of the Printed Hearings on H. R. 11662, 74th Congress.

As a result, in subsequent bills (namely, H. R. 12680 of the 74th Congress, H. R. 4008 of the 75th Congress, and H. R. 6586 of the 75th Congress) all reference to gas pressures was eliminated from what eventually became Section 1 (b) of the Act. The Committee, which finally rendered a favorable report on H. R. 6586, very lucidly stated its conception of the

purpose of this litigation. We quote from the Committee's report (Report No. 709, 75th Congress, 1st Session):

> "The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State Regulation. (See *Pennsylvania Gas Co., v. Public Service Commission* (1920) 252 U. S. 23.) *There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction.* However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri v. Kansas Gas Co.* (1924) 265 U. S. 298, and *Public Service Commission v. Attleboro Steam & Electric Co.* (1927) 273 U. S. 83) *The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.*" (Emphasis supplied.)

That the Congress had in mind the so-called "Cooley" principle which was enunciated in the Pennsylvania Gas Company case above referred to cannot be seriously questioned; and the deliberate deletion of all reference to gas pressures in Section 1 (b) indicates

that the Congress did not intend that gas pressures should have any relevance whatever in determining the status of gas companies under the Act, or in delineating the e x t e n t of the Federal Power Commission's jurisdiction.

3. That the East Ohio Gas Company is a distributing company is equally beyond question. It makes no wholesale sales. Each of its customers consumes the gas he purchases. To say that East Ohio Gas Company's operations cover a large part of the State of Ohio, and it is therefore not a distributing company within the meaning of the Act, is to make mere size a criterion; and it is respectfully submitted that the character of this company is to be determined by its function and not by the area that its operations cover.

4. As Mr. Justice Jackson's dissenting opinion points out, the purpose of the Natural Gas Act was to supplement but not to supplant state regulation; and, as he states, "What the Power Commission asks the Court to do today is not to fill a gap in the states' power to regulate, for there is none, but to create a gap in order to make room for federal power."

CONCLUSION

It is respectfully urged that the petitions for rehearing be granted and that the decree of the United

States Court of Appeals for the District of Columbia Circuit be, upon further consideration, affirmed.

Respectfully submitted,

BOLIVAR E. KEMP, JR.,
Attorney General of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General of Louisiana,
Attorneys for Louisiana Public Service Commission, amicus curiae.

CERTIFICATE OF COUNSEL

I, one of the attorneys for the Louisiana Public Service Commission, *amicus curiae*, do hereby certify that the foregoing memorandum in support of the petitions for rehearing in this cause is presented in good faith, and not for delay.

JOHN L. MADDEN,
Assistant Attorney General of Louisiana,

Attorney for Louisiana Public Service Commission, amicus curiae.

NO. 71.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

FEDERAL POWER COMMISSION, *Petitioner*,

v.

THE EAST OHIO GAS COMPANY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit.

MEMORANDUM IN SUPPORT OF PETITIONS FOR REHEARING SUBMITTED ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AND CERTAIN STATE REGULATORY COMMISSIONS, AMICI CURIAE.

WALTER R. MCDONALD,
AUSTIN L. ROBERTS, JR.,
Attorneys for Said Association and Said State Commissions,
7413 New Post Office Building,
I. C. C. Section,
Washington 25, D. C.

January 24, 1950.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 71.

FEDERAL POWER COMMISSION, *Petitioner*,

v.

THE EAST OHIO GAS COMPANY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit.

MEMORANDUM IN SUPPORT OF PETITIONS FOR REHEARING SUBMITTED ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AND CERTAIN STATE REGULATORY COMMISSIONS, AMICI CURIAE.

To the Honorable Supreme Court of the United States:

Come now the National Association of Railroad and Utilities Commissioner and the below-listed State regulatory commissions, *amici curiae*, and present this memorandum in support of the petitions for rehearing presented by the Respondents in the above-entitled cause, and, in support thereof, respectfully show:

1. The following state regulatory agencies are greatly concerned over the sweeping effect of the majority decision in this cause, which expands Federal Power Commission jurisdiction to the extent of curtailing and rendering ineffective current state commission regulation, and have authorized the National Association to specifically register

their support in this request for rehearing and reconsideration of this case:

Arizona Corporation Commission
Arkansas Public Service Commission
California Public Utilities Commission
Delaware Public Service Commission
District of Columbia Public Utilities Commission
Georgia Public Service Commission
Idaho Public Utilities Commission
Illinois Commerce Commission
Indiana Public Service Commission
Iowa State Commerce Commission
Kansas State Corporation Commission
Kentucky Public Service Commission
Louisiana Public Service Commission
Maine Public Utilities Commission
Maryland Public Service Commission
Massachusetts Department of Public Utilities
Michigan Public Service Commission
Missouri Public Service Commission
Montana Board of Railroad Commissioners
Nebraska State Railway Commission
Nevada Public Service Commission
New Hampshire Public Service Commission
New Jersey Board of Public Utility Commissioners
New Mexico Public Service Commission
North Carolina Utilities Commission
North Dakota Public Service Commission
Oklahoma Corporation Commission
Oregon Public Utilities Commissioner
Pennsylvania Public Utility Commission
South Dakota Public Utilities Commission
Tennessee Railroad and Public Utilities Commission
Vermont Public Service Commission
Virginia State Corporation Commission
Washington Public Service Commission
West Virginia Public Service Commission
Wisconsin Public Service Commission
Wyoming Public Service Commission

The New York Public Service Commission joins in the application for rehearing and reconsideration of this case,

though not authorizing the joinder of their name on this memorandum in support thereof.

2. The majority opinion states:

> "... the national commerce power alone covered the high pressure trunk lines to the point where pressure was reduced and the gas entered local mains, while the state alone could regulate the gas after it entered those mains."

That the commerce power may have such far-reaching effect is not relevant here. The legislative history of the Natural Gas Act clearly shows that Congress did not intend to give *plenary* powers to the Federal Power Commission (NARUC brief, pp. 14-25). This court, in cases cited on pages 21 to 25 of our brief, *amici curiae*, has consistently held that the Act was designed to supplement not supplant state regulation. The existence of state jurisdiction over the regulation of local natural gas distributing companies has uniformly been determined in the past on the basis of the *Cooley* doctrine (*Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23). To abandon the *Cooley* doctrine in favor of a theory based on the mechanics of the gas industry leads not only to horrendous but vague and nebulous results, as is ably pointed out in the petition for rehearing by the State of Ohio and the Public Utilities Commission of Ohio.

It is apparent from the legislative history of the Act that no such "pressure" theory was intended as determinative of the line of demarcation between the exercise of state and federal authority. Section 1(b) of H. R. 11662 contained a proviso exempting local distribution from federal jurisdiction only if such distribution was from low-pressure mains. (NARUC brief, p. 16). Mr. Benton, then General Solicitor of this Association, suggested an amendment to correct this, so that it would be perfectly clear that any distribution to an ultimate consumer, whether from high or low-pressure mains, would be exempt from federal regula-

tion, and thus subject to state regulation. (Printed Hearings, H. R. 11662—74th Congress, p. 91).

The exact wording of Mr. Benton's proposal was not accepted but the Committee made revisions in Section 1(b) designed to accomplish this same purpose. In subsequent bills, H. R. 12680—74th Congress, H. R. 4008—75th Congress, and H. R. 6586—75th Congress, all reference to gas mechanics, i.e., low-pressure mains, was eliminated from the provisions of Section 1(b) of the Act. Congress did not intend the business of local distribution of natural gas to ultimate consumers to come within the provisions of the Act. In its report, favorably recommending H. R. 6586, (Report No. 709, 75th Congress, 1st Session) the House Committee said:

> "The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State Regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23). There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924) 265 U. S. 298, and *Public Service Commission* v. *Attleboro Steam & Electric Co.* (1927) 273 U. S. 83). The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

Congress thus wrote into the Natural Gas Act a limitation on Federal Power Commission jurisdiction based on the *Cooley* doctrine as evidenced in the *Pennsylvania Gas*

Co. case and not based on a "pressure" theory peculiar to the mechanics of the industry.

3. The majority opinion states further:

> "And in the light of the *Illinois Gas* decision we cannot see how the 'local distribution' proviso can be construed as encompassing all of East Ohio's operations throughout the state. That proviso cannot mean one thing for 'transportation' and another where 'sale for resale' is involved."

It is respectfully pointed out that the *Illinois Gas* decision cannot be applied by analogy to the present case. Illinois Gas Co. was engaged in wholesale sales of natural gas. East Ohio makes no sales for resale, being engaged solely in the local distribution of natural gas. Congress clearly distinguished between these two types of operations and in the above-quoted passage of the House Committee report on H. R. 6585 indicated this in stating ". . . in the case of sales for resale . . . the legal situation is different." Congress intended the continued application of the *Pennsylvania Gas Co.* doctrine in cases involving local distribution, and the application of the *Kansas Gas Co.* doctrine and *Attleboro* doctrine in cases involving wholesale sales, or sales for resale.

That this delineation as related to Federal Power Commission jurisdiction is of practical importance is evident in the instant case. Regulation, accounting-wise, is a necessary adjunct to the establishment of reasonable and just wholesale rates, or rates for sales for resale. East Ohio, however, makes no sales for resale, and even under the majority opinion, the rates for ultimate public consumption, the distribution rates, are exclusively within the jurisdiction of the Ohio Commission. Regulation, accounting-wise, by the Federal Power Commission in the case of East Ohio serves no useful or necessary purpose. The record makes no showing of such. The case involves no rates subject to F.P.C. determination. To uphold the F.P.C. accounting

order can result in only further conflict, accounting-wise between the state and federal commission, and in possible further litigation. The unnecessary extension of the federal power, primarily, however, will result in increased expense to the company which will be reflected in the rates charged the ultimate consumer.

4. The majority opinion states:

> ". . . the logical consequence of such a principle would be that even a pipe line stretching from Texas to Cleveland would be completely exempt from the federal Commission's jurisdiction if it were owned by East Ohio."

We wish to assure the Court that this Association and the State regulatory agencies represented in its membership subordinate themselves to no one in their earnest endeavor and determination to assure that no hiatus or gap should result in the overall natural gas regulatory picture. It was this Association and these State regulatory agencies that actively sought and supported before Congress the precise legislation involved here, the Natural Gas Act, in order to eliminate gaps and make natural gas regulation effective, nation-wise. That the above hypothesis is legally unsound is ably pointed out in Mr. Justice Jackson's dissent in the present case.

Conclusion.

It is respectfully urged that the petitions for rehearing be granted and that the decree of the United States Court of Appeals for the District of Columbia Circuit be, upon further consideration, affirmed.

Respectfully submitted,

Walter R. McDonald,
Austin L. Roberts, Jr.,
Attorneys for Said Association and Said State Commissions.

Certificate of Counsel.

We, attorneys for the National Association of Railroad and Utilities Commissioners and the above-listed State regulatory commissions, *amici curiae*, do hereby certify that the foregoing memorandum in support of the petitions for rehearing in this cause is presented in good faith, and not for delay.

Walter R. McDonald,
Austin L. Roberts, Jr.,
Attorneys for Said Association and Said State Commissions.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 71

FEDERAL POWER COMMISSION,
Petitioner,

vs.

EAST OHIO GAS COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF STATE OF GEORGIA AS AMICUS CURIAE

EUGENE COOK,
Attorney General of Georgia,
HARDEMAN BLACKSHEAR,
Assistant Attorney General of Georgia.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 71

FEDERAL POWER COMMISSION,

Petitioner,

vs.

THE EAST OHIO GAS COMPANY, ET AL.,

Respondents

AMICUS CURIAE BRIEF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The State of Georgia, a sovereign State of the United States of America, files this brief in support of the petition for the motion for rehearing to the United States Court of Appeals for the District of Columbia, filed in this Court by the East Ohio Gas Company, respondents.

Interest of the Amicus Curiae

1. The sweeping effect of the majority opinion in the above named cause expands Federal Power Commission jurisdiction to the extent of curtailing and rendering ineffective current State commission regulation.

2. The legal position of the State of Georgia differs from that of the petitioner upon the question of the interpretation of the Natural Gas Act relative to interstate commerce.

3. The legal position of the State of Georgia differs from that of the petition upon the question of the power of the Federal Power Commission over state regulation of the flow of natural gas.

4. The State of Georgia, though not an original party to this cause, recognizes the usurping effect of a denial of the motion for rehearing in this cause and that such a denial will result in Federal encroachment upon the sovereign rights of the several States in their regulation of intrastate commerce.

Statement of the Case

East Ohio owns and operates a natural-gas business solely in Ohio, selling gas to more than a half-million Ohio consumers through local distributing systems. Most of this natural gas is transported into Ohio from Kansas, Texas, Oklahoma, and West Virginia through pipelines of Panhandle Eastern Pipe Line Company and of Hope Natural Gas Company, an affiliate of East Ohio. Inside the Ohio boundary these interstate lines connect with East Ohio's large high-pressure lines which the imported gas, propelled mainly by its own pressure, flows continuously more than 100 miles to East Ohio's local distributing systems.

The Federal Power Commission requested hearings and after such found that the East Ohio Company was a natural gas company and subject to the commission's jurisdiction. On these findings, the Company was ordered to keep accounts and submit reports as required by the Natural Gas Act, 15 U. S. C. 717. The Commission re-

jected the Company's contentions that its operations were not covered by the Act and that the expense of supplying the required information was so great as to transgress statutory and contitutional limits. The Court of Appeals for the District of Columbia, without reaching other contentions, reversed the commission's orders on the ground that the Company was not "engaged in the transportation of gas in interstate commerce within the meaning of the Act." Petitioner applied to the Supreme Court of the United States for writ of certiorari, which was granted, resulting in a majority decision in favor of the petitioner. The State of Georgia presents this brief, amicus curiae, in support of the respondent East Ohio Company, in their motion for rehearing.

Issues Involved

The questions presented by this petition, may be summarized as follows:

1. Does the Natural Gas Act grant to the Federal Power Commission the authority to regulate natural gas companies whose operations occur solely within the confines of one state, with no indulgence in actual interstate commerce?

2. Is local distribution of natural gas embraced in the Act's interpretation of interstate commerce so as to strip the States of their power of regulation?

3. Is a theory based on the particular points of "pressure" the logical and reasonable standard by which to measure the point of the beginning and ending of interstate commerce?

Argument and Citation of Authority

The purpose of the Natural Gas Act was not to preempt the field of regulation in favor of the Federal Power Commission, but rather as an aid to the States in their regulation of the flow of gas through interstate commerce to them.

The decision of this Court in the case of *Public Utilities Co. v. United Fuel Gas Co.*, 317 U. S. 465 stated:

> "It is clear as the legislative history of the Act demonstrates that Congress meant to create a scheme of regulation which would be complementary in its operation to that of the States, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate commerce, to the extent defined in the Act, and local matters would be left to the State regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and State regulatory bodies operating side by side, each active in its own sphere."

This case clearly discloses the intention of the Congress upon passage of the Natural Gas Act. The question of whether or not Congress gave to the Federal Power Commission the authority to regulate the flow of gas in interstate commerce is therefore not disputed here. However, the majority opinion in the cause here interprets the Natural Gas Act to mean that the interstate commerce does not end at the point of distribution throughout the State, but rather, that interstate commerce continues to the point of consumption by the ultimate consumer, thereby stripping the State of its sovereign right to govern its intrastate commerce. Such construction as given in the cause at bar is in direct conflict with the intention of Congress and the previous decisions of this Court. This Court, in the case of *Pennsylvania*

Gas Company v. *Public Service Commission*, 252 U. S. 23, said:

> "While the manner in which the State business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest and has not been attempted under the superior authority of Congress."

Further:

> "It may be conceded that the local rates may effect the interstate business of the company. But this fact does not prevent the state from making local regulations of a reasonable character."

It is well to note that the litigation here involved a gas company whose operations extended from its plant in one State to the ultimate consumer in another. To more vividly emphasize the point presented here, there was also no intervening agent, such as the East Ohio Company, but rather, the gas was sold direct from the distributor in the one State to the ultimate consumer in another.

It is our earnest contention that the operation of the East Ohio Company fell not within the jurisdiction of the Federal Power Commission. The distribution by the East Ohio Company, being local in its nature, is purely intrastate commerce and therefore the subject of State regulation. In *Public Utilities Commission* v. *Landon*, 249 U. S. 236, headnote #2, this Court held:

> "The sale and delivery of gas to customers at burner tips by local distributing companies operating under special franchises, *and the payment of two-thirds of their receipts to the natural gas companies furnishing the gas through interstate pipe lines, do not constitute any part of interstate commerce* so as to exclude state regulation of local rates as confiscatory and unduly burdening such commerce." (Emphasis ours.)

The cause at bar is analogous to the above cited case, and we most earnestly request this Court's reliance upon the same as authority.

Authority for the decision of the cause at bar, is the case of *Illinois Natural Gas Company* v. *Central Illinois Public Service Commission,* 314 U. S. 498, which case, is not analogous to the issues involved here. In the *Illinois* case, supra, the gas was obtained for the purpose of *resale* to local distributing companies, and therefore within the purview of the Act. In the cause at bar, however, the distributing company and the receiving company (that company that received the gas from the pipes in interstate commerce) are one and the same. The gas is sold direct to the ultimate consumer by the East Ohio Company. There is no intervening seller, as is anticipated by the Act, and the business of the East Ohio Company is clearly a matter of public necessity and is intrastate commerce, which, as a consequence, falls without the jurisdiction of the Federal Power Commission. Further emphasizing this point is headnote # 4 of the *Illinois* case, *supra:*

> "The extension of the facilities of a local pipe line selling at wholesale gas which it acquires by connection with an interstate pipe line within the state is so intimately associated with the interstate movement of natural gas as to be within the regulatory power of Congress, even though, *strictly considered, the interstate commerce in bringing the gas into the state ends before its delivery by the local pipe line to distributors within the state.*" (Emphasis ours.)

Considering the variance of the two factual situations, the Illinois case cannot be said to be authority for the decision of the majority in the cause at bar.

II

The majority opinion states:

> "In a series of cases repeatedly called to the attention of the House Committee, this Court has declared that the States could regulate interstate gas only after it was reduced in pressure and entered a local distributing system. (Citations) Under these decisions state regulatory power could not reach high pressure trunklines and sales for resale. This was the gap which Congress intended to close."

While the sale of gas for resale is provided for in the Act itself, we cannot hold tenable the application of any particular points of pressure in deciding where interstate commerce ends and intrastate commerce begins. To hold that such was the intention of the Act is folly. This Court declared in *Central States Electric Company* v. *Muscatine*, 324 U. S. 137, 89 L. Ed. 801:

> "The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, the means adopted was limited to the regulation of sales in interstate commerce at wholesale, leaving to the State the function of regulating the intrastate distribution and sale of the commodity. That Congress intended to leave intrastate transactions to State regulation is clear, not only from the language of the Act, but from the exceptionally explicit legislative record, and from this Court's decisions."

Further in the case of:

Federal Power Commission v. *Hope Natural Gas. Co.*, 320 U. S. 591, this Court held:

> "The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies . . . in accomplishing that purpose, the bill was designed to take no authority from

State commissions and was so drawn as to complement and in no manner usurp State regulatory authority."

We vehemently insist that the "pressure" theory, as used in the opinion of the majority was not the intention of Congress and is not the standard by which intrastate commerce can be equitably measured. The evils which were sought to be cured by the passage of the Act are not present in the cause at bar.

We wish to impress upon this Court the magnitude of the majority decision and the awe resulting effect a denial of this our motion for rehearing will have upon the rights of the sovereign States. We conscientiously support the view as expressed by Mr. Justice Jackson's dissent and urge this Court's indulgence in the affirmation of the same.

Conclusion

It is respectfully urged that the petition for rehearing be granted and that the decree of the United States Court of Appeals for the District of Columbia Circuit be, upon further consideration, affirmed.

Respectfully submitted,

EUGENE COOK,
Attorney General of Georgia.
HARDEMAN BLACKSHEAR,
Assistant Attorney General of Georgia.

NO. 71

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

FEDERAL POWER COMMISSION, *Petitioner*,

v.

THE EAST OHIO GAS COMPANY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit.

MEMORANDUM IN SUPPORT OF PETITIONS FOR REHEARING SUBMITTED ON BEHALF OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, AMICUS CURIAE.

WILLIAM C. MARLAND,
Attorney General of West Virginia.

CHARLES M. LOVE,
1101 Security Building,
Charleston, West Virginia.

WALTER R. MCDONALD,
7413 New Post Office Bldg.,
I. C. C. Section,
Washington 25, D. C.,
Attorneys for the Public Service Commision of West Virginia.

February 1, 1950.

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 71

FEDERAL POWER COMMISSION, *Petitioner*,

v.

THE EAST OHIO GAS COMPANY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit.

MEMORANDUM IN SUPPORT OF PETITIONS FOR REHEARING SUBMITTED ON BEHALF OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, AMICUS CURIAE.

To the Honorable Supreme Court of the United States:

Comes now the Public Service Commission of West Virginia, *amicus curiae*, and presents this memorandum in support of the petitions for rehearing presented by the Respondents in the above entitled cause and in support thereof says:

1. The Public Service Commission of West Virginia is the regulatory agency of said State, created by Act of the Legislature of said State (Acts of the Legislature of West Virginia 1913 C.9, Acts 1915 C.8, 1921 C.150, Official

Code of West Virginia 1931, Chapter 24). Said Commission by said Acts of the Legislature is given regulatory powers with respect to rates, methods and practices of public utilities within said State.

2. Said Public Service Commission is concerned over the sweeping effect of the majority decision in this cause, which expands Federal Power Commission jurisdiction to the extent of curtailing and rendering ineffective to some extent current regulation by said Public Service Commission. It was admitted prior to the passage of the Natural Gas Act that state regulatory bodies such as the Public Service Commission of West Virginia had jurisdiction over the transportation and sale of gas within its borders and to fix the rate therefor, and since it is admitted that the purpose of the Natural Gas Act, at the time of its passage was not to take from state regulatory bodies any jurisdiction that they had over the transportation and sale of gas within their respective states, we respectfully submit that that jurisdiction remains with state regulatory bodies, and if we are correct in this the Federal Power Commission has no jurisdiction over the transportation and sale of gas wholly within the State.

3. The majority opinion as to which rehearing is sought holds:

> "... the national commerce power alone covered the high pressure trunk lines to the point where pressure was reduced and the gas entered local mains, while the state alone could regulate the gas after it entered those mains."

Such holding would seem to restrict the regulatory power of the states, including West Virginia, to a small service area, served only by a low pressure transmission system and which indicates that the next construction will de-

fine as extending no further than the city gates. In fact, the instant opinion says "state regulatory power could not reach high pressure trunk lines." We respectfully submit that this is new thinking on this subject and a radical departure from what we have heretofore understood to be the law. The majority opinion complained of drives this point home later by saying "once a company is found to be a 'natural gas company,' no state can interfere with federal regulation."

The last statement quoted from the majority opinion also demonstrates the departure from the former rule as heretofore it has been thought that the Natural Gas Act was designed to supplement and not supplant state regulation.

We respectfully suggest that this change in construction does not appear to be consistent with prior decisions of this Court in the light of the legislative history of the Natural Gas Act. In the case of *Panhandle Eastern Pipe Line Co.* v. *Commission,* 332 U. S. 507, the Court said on page 519 that in extending federal regulation Congress "was meticulous to take in only territory which this Court had held the states could not reach." In the case last cited, this Court said, beginning on page 517:

> "The Act (Natural Gas Act), though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. This appears not merely from the situation which led to its adoption and the legisla-

tive history,[1] including the committee reports in Congress cited above, but most plainly from the history of § 1 (b) in respect to the changes which took place in reaching its final form.

"It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption. Yet this, in effect, is what appellant asks us to do. For the essence of its position, apart from standing directly on the commerce clause, is that Congress by enacting the Natural Gas Act has 'occupied the field,' i. e., the entire field open to federal regulation, and thus has relieved its direct

[1]Included in the legislative history referred to is note 13 of said opinn here quoted in full:

"In HR Rep No. 709, 75th Cong 1st Sess the Committee on Interstate and Foreign Commerce said of the proposed bill which became the Natural Gas Act: 'It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Serv. Commission* (1920) 252 US 23, 64 L ed 434, 40 S Ct 279, PUR 1920E 18.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.* (1924) 265 US 298, 68 L ed 1027, 44 S Ct 544, and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (1927) 273 US 83, 71 L ed 549, 47 S Ct 294.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.'

"See also HR Rep No. 2651, 74th Cong 2d Sess 1-3; Sen Rep No. 1162, 75th Cong 1st Sess."

industrial sales of any subordination to state control.

"The exact opposite is the fact. Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach."

"In HR Rep No. 709, 75th Cong 1st Sess the Committee on Interstate and Foreign Commerce said of the proposed bill which became the Natural Gas Act: 'It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Serv. Commission* (1920) 252 US 23, 64 L ed 434, 40 S Ct 279, PUR 1920E 18.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.* (1924) 265 US 298, 68 L ed 1027, 44 S Ct 544, and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (1927) 273 US 83, 71 L ed 549, 47 S Ct 294.) The basic purpose of the present legislation is to ccupy this field in

which the Supreme Court has held that the States may not act.'

"See also HR Rep No. 2651, 74th Cong 2d Sess 1-3; Sen Rep No. 1162, 75th Cong 1st Sess."

Most respectfully we suggest that the legislative history of the Natural Gas Act clearly shows that Congress did not intend to give plenary powers to the Federal Power Commission and this Court in the past has consistently (or so we believe) held that the Act was designed to supplement and not supplant state regulation. The existence of state jurisdiction over the regulation of local natural gas distributing companies has uniformly been determined in the past on the basis of the Cooley doctrine (*Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23). The present decision apparently abandons the Cooley doctrine in favor of a theory based on the mechanics of the gas industry. We cannot believe that Congress intended gas pressure, either natural or manufactured, to be determinative of jurisdiction as between state and federal regulation.

With all due deference we point out that the *Illinois Gas* decision, 314 U. S. 498, upon which the instant decision is predicated, is not analogous to the instant case as that company was engaged in wholesale sales of natural gas, whereas East Ohio makes no sales for resale, being engaged solely in the local distribution of natural gas. That Congress had this clearly in mind would seem to be amply demonstrated by the footnote herein quoted in extenso as footnote 13 to the opinion in the *Panhandle case* wherein it is said:

"* * * However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different."

4. Of course, the instant decision is no less important as to accounting regulation. Regulation, accounting-wise, by the Federal Power Commission in the case of East Ohio serves no useful or necessary purpose. The record makes no showing of such. The case involves no rates subject to Federal Power Commission determination. To uphold the Federal Power Commission accounting order can result only in further conflict, accounting-wise, between the state and federal commission, and ultimately further litigation. The unnecessary extension of the federal power, primarily, however, will result in increased expense to the company which will be reflected in the rates charged the ultimate consumer.

Conclusion

The Public Service Commission of West Virginia was one of the state agencies which urged the passage of the original Natural Gas Act upon Congress and has long sought complete regulation of utilities in the interest of the consumers of natural gas in West Virginia, and most respectfully urges that the petitions for rehearing be granted and the decree of the United States Court of Appeals for the District of Columbia be, upon further consideration, affirmed.

All of which is respectfully submitted.

WILLIAM C. MARLAND,
Attorney General of West Virginia.

CHARLES M. LOVE,

WALTER R. MCDONALD,
Attorneys for the Public Service Commision of West Virginia.

Cerificate of Counsel

We, attorneys for the Public Service Commission of West Virginia, *amicus curiae*, do hereby certify that the foregoing memorandum in support of the petitions for rehearing in this cause is presented in good faith, and not for delay.

WILLIAM C. MARLAND,
Attorney General of West Virginia.

CHARLES M. LOVE,

WALTER R. MCDONALD,
Attorneys for the Public Service Commision of West Virginia.

No. 71.

In the Supreme Court of the United States

OCTOBER TERM, 1949.

FEDERAL POWER COMMISSION,
Petitioner,

vs.

THE EAST OHIO GAS COMPANY,
STATE OF OHIO,
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

PETITION FOR REHEARING BY THE STATE OF OHIO and THE PUBLIC UTILITIES COMMISSION OF OHIO.

HERBERT S. DUFFY,
Attorney General of Ohio,
KENNETH B. JOHNSTON,
Assistant Attorney General of Ohio,
Attorneys for Respondents the State of Ohio and The Public Utilities Commission of Ohio.

HAROLD L. MASON, *Chairman,*
HARRY M. MILLER, *Commissioner and Former Chairman,*
RAY O. MARTIN, *Commissioner,*
The Public Utilities Commission of Ohio,
Of Counsel.

January, 1950.

In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. 71.

FEDERAL POWER COMMISSION,
Petitioner,

vs.

THE EAST OHIO GAS COMPANY,
STATE OF OHIO,
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

PETITION FOR REHEARING BY THE STATE OF OHIO and THE PUBLIC UTILITIES COMMISSION OF OHIO.

To the Honorable the Justices of the Supreme Court of the United States:

The State of Ohio and The Public Utilities Commission of Ohio, respondents herein, present this petition for a rehearing because the Opinion of the Court herein, if unaltered, will destroy effective State regulation of Ohio natural gas distributing companies.

A. THE UNFORTUNATE EFFECT OF THE OPINION HEREIN ON OHIO REGULATION OF NATURAL GAS RETAILING COMPANIES.

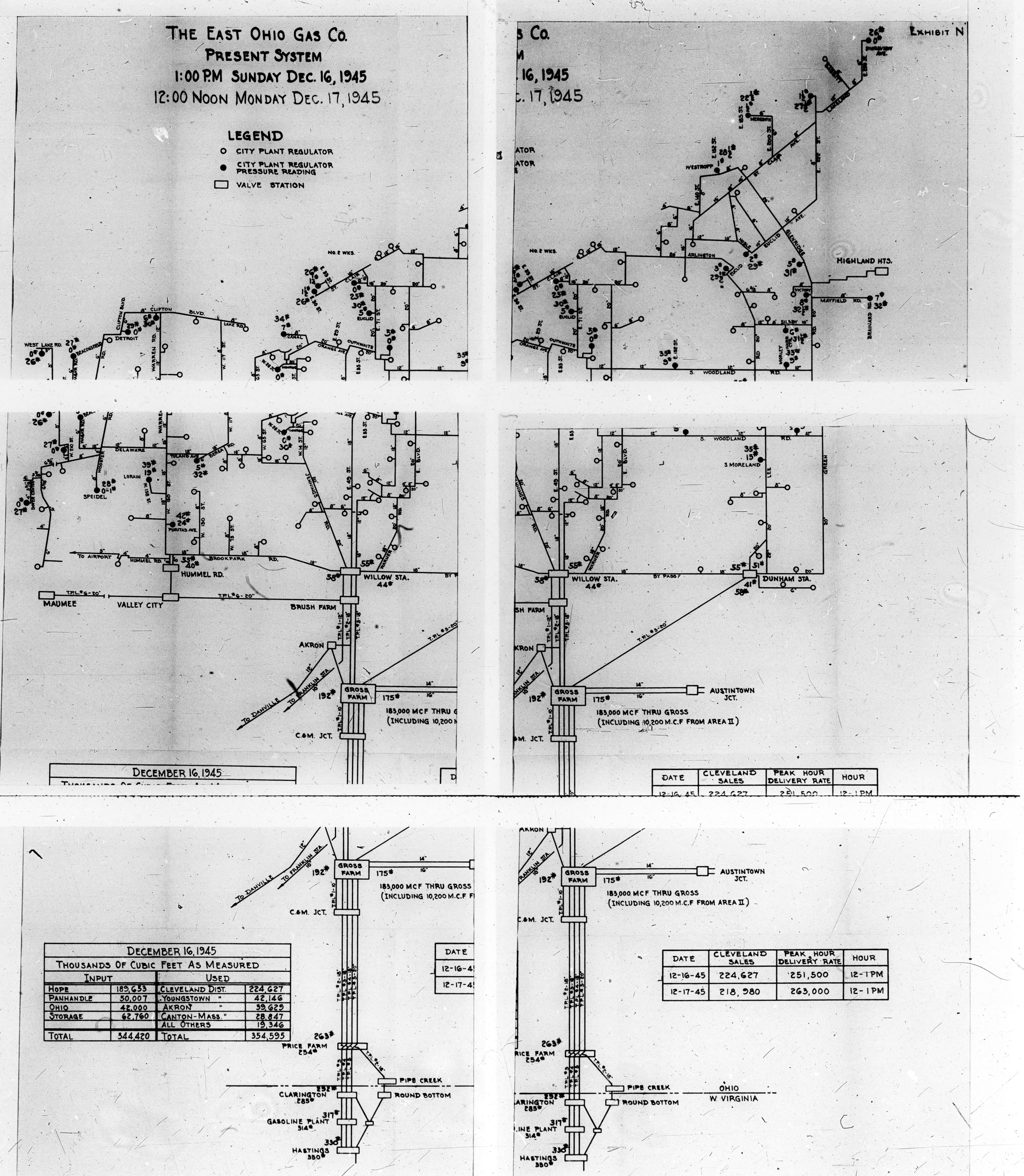
1. Before the Opinion of the Court herein was issued it was long settled, in practice and in law, that Ohio had complete rate and other regulatory jurisdiction over all

Exhibit N

The East Ohio Gas Co.
Present System
1:00 P.M. Sunday Dec. 16, 1945
12:00 Noon Monday Dec. 17, 1945

Legend

- ○ City Plant Regulator
- ● City Plant Regulator Pressure Reading
- ▭ Valve Station



December 16, 1945			
Thousands Of Cubic Feet As Measured			
Input		Used	
Hope	189,653	Cleveland Dist.	224,627
Panhandle	50,007	Youngstown "	42,146
Ohio	42,000	Akron "	39,629
Storage	62,760	Canton-Mass. "	28,847
		All Others	19,346
Total	344,420	Total	354,595

Date	Cleveland Sales	Peak Hour Delivery Rate	Hour
12-16-45	224,627	251,500	12-1 PM
12-17-45	218,980	263,000	12-1 PM

purely retail distributing companies in Ohio, including East Ohio. By a stroke of the pen this is all changed. Ohio and the Ohio Commission are now advised by the Court that:

> "the national commerce power *alone* covered the high-pressure trunk lines to the point where pressure was reduced and the gas entered local mains, while the state *alone* could regulate the gas after it entered those mains." (Italics here and later ours.)

> "Under these decisions state regulatory power could not reach high-pressure trunk lines * * *."

and that the Federal Power Commission now has sole regulatory power over high-pressure trunk lines because:

> "Here as elsewhere, once a company is properly found to be a 'natural gas company,' no state can interfere with federal regulation."

Obviously one party or another—in every rate or other regulatory proceeding before us from now on—will cite these rulings to deny our Ohio jurisdiction and deny the applicability of Ohio law to all high-pressure lines of retail distributing companies purchasing out-of-state gas. And this means substantially all companies in Ohio. More than this, these rulings will deny our Ohio jurisdiction and law over much of the other property of our Ohio companies. In a company serving several communities, as most of our companies do, much property is jointly used in connection with the operation of both high and low pressure lines—office buildings, warehouses and yards, telephone systems, trucks, garages, laboratories and the like.

By the Opinion our present right to regulate service from and extensions of high-pressure lines in Ohio is declared to be ended. Before any of our Ohio companies can add a foot of pipe to these lines, or undertake to serve an additional community or suburban area, or install an additional compressor station, or drill an additional storage well, or purchase an additional lease for gas storage pur-

poses, or add an additional garage or office building, they must run to the Federal Power Commission in Washington for permission. We are denied, and our Ohio cities are denied, any right to supervise or contract with respect to these purely local matters. And our Ohio consumers must bear all the additional expense of getting federal approval for what we in Ohio know must be done anyhow if our citizens are not to suffer.

When it comes to rate regulation the Opinion's novel view of the language and purpose of the Natural Gas Act and the extent of exclusive federal power creates chaos. *A regulatory gap is created where none ever existed before.*

We who have had practical experience know that whatever party can see some advantage therefrom will urge upon us that the valuation and expense theories of the Federal Power Commission *must* be controlling upon us in respect of much of every retail company's property in connection with our regulation of local distribution rates. Under Section 5(b) of the Natural Gas Act the Federal Power Commission "*may,*" and only when "it can do so without prejudice to the efficient and proper conduct of its affairs," "investigate and determine the cost of the * * * transportation of natural gas by a natural-gas company" where it has no authority to establish rates. Suppose it doesn't do so, or it delays for years in doing so (and the present log jam before the Federal Power Commission indicates that this is a very practical problem), are we to cease functioning in Ohio or to guess at the applicable Federal Power Commission principles in reaching our determinations?

If we accept a Federal Power Commission cost finding, as the Opinion seems to require, we will be met with the argument that our rate decision is based on an *ex parte* proceeding. If we make our own determination we will be met with the argument that we have misapplied federal law. There will not be a single gas distribution rate case before

us henceforth in which it will not be urged that a federal question is presented. Thus Section 5(b) becomes, not an aid to effective State regulation as intended by Congress, but its obstructor and destroyer. We are denied jurisdiction, but the Federal Power Commission may or may not exercise its exclusive power. Ohio is put at the mercy of all of the Federal Power Commission's other business.

Rate litigation which we have managed in recent years in Ohio to determine expeditiously and on well established principles of statutory and common law will henceforth be endless, confusing and extremely costly, all to the detriment of Ohio gas rates and service.

2. We are now advised by the Opinion, contrary to the practicalities of the gas industry, to universal practice and to settled law before the Opinion, that:

> "states could regulate interstate gas *only* after it was reduced in pressure and entered a local distribution system."

and that here is the limit of Ohio's authority *today* under the Natural Gas Act.

We most respectfully submit that the Court's apparent conception that there is a clearly defined point on the lines of each local distributing company where gas is reduced in pressure and enters a "local distribution system" is one that seems as if it must logically be so, but in fact is not.

Our Ohio retail companies in purchasing gas wholesale from interstate pipe line companies buy this gas at connections with the interstate lines at anywhere from 50 to well over 1,000 pounds pressure. Whatever the purchase pressure, by the time gas reaches the consumer its pressure is from 4 to 6 ounces. This, however, is accomplished gradually and by many steps. Depending upon the length of the connecting line or lines—the stub lines—a substantial reduction in pressure gradually occurs by the

time these lines connect with others which spread the gas through a larger area. That is merely a law of physics. In the case of East Ohio these other lines are called intermediate high-pressure lines. In a footnote in the Federal Power Commission's brief, page 7, the impression is given that these encircle each city. Actually they both encircle and interlace city streets (R. 65) and connect with numerous other lines of successively smaller sizes which ultimately branch out into the service lines to each customer where the pressure becomes 4 to 6 ounces (R. 66). Had we understood that the Court would be interested in gas mechanics we would have called its attention to a diagrammatic map in the record (Exhibit "N" to application in Docket No. G-695, Tr. Vol. II, p. 242, Tr. Vol. IX, p. 3316). It was not printed but a copy is attached. It shows this intermediate high-pressure system as running through the streets and elsewhere in the Cleveland area and the pressures on a day of shortages of gas in Cleveland as well as on the following day (Tr. Vol. II, pp. 246-248). Of course to practical regulatory authorities the mechanics and successive pressures resulting from the movement of gas through a system have heretofore had no practical or legal consequences.

The confusion explained in Item 1 above which will result in Ohio gas regulation because of the Opinion becomes worse when the question arises, as it will arise in every gas rate proceeding before us from now on, as to how far exclusive Federal Power Commission jurisdiction extends. Does it run through city streets to the point where the intermediate high-pressure lines connect with the large size distribution mains, or does it stop somewhere prior to that point? In the less complicated local distribution systems where the stub lines connect at various points within and without a city with the larger sized local mains, does it run to where these larger local mains are in turn connected with lines running up the side streets, or where?

There simply is no one undebatable point on each local system where gas is "reduced in pressure" and "enters a local distribution system."

3. The effects of the Opinion which will so unfortunately follow in Ohio and elsewhere in the future are the very effects which Ohio and other States were constantly assured during the Congressional hearings would not happen under the Natural Gas Act. They are the effects also, with other needless regulatory duplication and expense, which the States were assured by all prior decisions of this Court were not intended by the Natural Gas Act and would not be permitted by this Court—despite the zeal of the Federal Power Commission to extend its partial authority over the natural gas industry into substantially complete authority.

B. SETTLED PRINCIPLES DISREGARDED IN THE COURT'S OPINION.

We most respectfully submit that the distressing practical effects of the Opinion to which we referred have resulted from disregarding at least the following principles which seem to us to have heretofore been definitely settled by this Court:

1. That there are three areas of federal and State jurisdiction—exclusively State, concurrently State and federal, and exclusively federal (see Ribble, *State and National Power over Commerce* (1936)). As we read the Opinion, the concurrent jurisdiction under which Ohio and other States have for many years successfully regulated local retail companies such as East Ohio, whatever the movement of the gas, is eliminated.

2. That the *Cooley* formula rather than a mechanical test is to determine areas of federal and State power. As

shown by *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23 (1920), the *Cooley* formula was law in the natural gas industry prior to 1938 as well as now.

3. That where the Congressional history of legislation establishes beyond question a definite purpose and intent, as in the case of the Natural Gas Act to supplement and not usurp State power, that intent is to be given effect in interpreting the Act.

In this connection we think a most significant point, perhaps overlooked by the Court, is that nowhere in the long history of the progress of the Natural Gas Act through Congress did any one on behalf of the Federal Power Commission, or any other proponent, point out that the Federal Power Commission would be given controlling federal regulatory authority over substantially all of the natural gas retail distributing companies in the United States.

4. That this Court will not interpret a federal act to read in a manner expressly rejected by Congress in the course of consideration of the legislation.

In this connection we point out that the Opinion as related to the transportation of natural gas in interstate commerce reaches the precise result that would have been reached under Section 1(b) of H. R. 11662, 74th Cong., 2d Sess. (1936), which read:

> "§ (b). *The provisions of this Act shall apply to the transportation of natural gas in high-pressure mains* in interstate commerce and to natural-gas companies engaged in such transportation, but *shall not apply to the distribution of natural gas moving locally in low-pressure mains* or to the facilities used for such distribution or to the production of natural gas: Provided, That nothing in this Act shall be construed to authorize the Commission to fix rates or charges for the sale of natural gas distributed locally in low-pressure mains or for the sale of natural gas for industrial use only."

However, the fact is that Congress rejected this provision and its mechanical test of jurisdiction. The Opinion nevertheless adopts it. Section 1(b) of the Natural Gas Act as actually passed used the *Cooley* formula approach. The Opinion rejects it.

5. That "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." *Market Co. v. Hoffman,* 101 U. S. 112, 115 (1879).

We most respectfully submit that the Opinion gives no effect whatsoever to the exclusion by Section 1(b) of Federal Power Commission jurisdiction over "other transportation"—or to the words in Section 1(b) that the "provisions" of the Act "shall not apply to the local distribution of natural gas or to the facilities used for such distribution." The Federal Power Commission's orders which the Opinion allows to go into effect apply to the very distribution facilities which the Opinion says are solely within State power, to-wit, the "local mains."

CONCLUSION.

We most respectfully urge that this Court should reconsider a decision which puts Ohio and its Commission, and all the other States and their Commissions, in the position of having their heretofore acknowledged regulatory powers over retail distributing companies superseded in substantial part—and obstructed for practical purposes *in toto*—by a reading of the Act which they were assured in Congress was not intended and were assured by prior decisions of this Court had not resulted.

Respectfully submitted,

HERBERT S. DUFFY,
Attorney General of Ohio,

KENNETH B. JOHNSTON,
Assistant Attorney General of Ohio,

Attorneys for Respondents the State of Ohio and The Public Utilities Commission of Ohio.

HAROLD L. MASON, *Chairman,*

HARRY M. MILLER, *Commissioner and Former Chairman,*

RAY O. MARTIN, *Commissioner,*

The Public Utilities Commission of Ohio,
Of Counsel.

Columbus, Ohio,
January, 1950.

CERTIFICATE OF COUNSEL.

I, Kenneth B. Johnston, counsel for the State of Ohio and The Public Utilities Commission of Ohio, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Kenneth B. Johnston,

Counsel for the State of Ohio and The Public Utilities Commission of Ohio.

January 20, 1950.

No. 71.

In the Supreme Court of the United States

OCTOBER TERM, 1949.

FEDERAL POWER COMMISSION,
Petitioner,

v.

THE EAST OHIO GAS COMPANY,
STATE OF OHIO,
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit.

PETITION FOR REHEARING BY THE EAST OHIO GAS COMPANY.

William B. Cockley,
Walter J. Milde,
Wm. A. Dougherty,
Attorneys for Respondent The East Ohio Gas Company.

C. W. Cooper,
Sturgis Warner,
Of Counsel.

January, 1950.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5647

In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. 71.

FEDERAL POWER COMMISSION,
Petitioner,

v.

THE EAST OHIO GAS COMPANY,
STATE OF OHIO,
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

PETITION FOR REHEARING BY THE EAST OHIO GAS COMPANY.

To the Honorable the Justices of the Supreme Court of the United States:

The East Ohio Gas Company, respondent herein, presents this petition for a rehearing and respectfully urges a reconsideration of the decision herein on the following grounds:

1. The several grave matters of conflict and confusion in Ohio regulation of East Ohio and other Ohio retail distributing companies which will result from the decision, all as set forth in the petition for rehearing by the State of Ohio and The Public Utilities Commission of Ohio. No utility or its customers should be the victims of unresolved doubts as to who regulates it and to what extent.

2. The following additional matters not fully set forth by the Ohio authorities:

the opinion herein which recognizes "the congressional exemption of local distribution systems."

Respectfully submitted,

William B. Cockley,
Walter J. Milde,
Wm. A. Dougherty,

Attorneys for Respondent
The East Ohio Gas Company.

C. W. Cooper,
Sturgis Warner,
Of Counsel.

January, 1950.

CERTIFICATE OF COUNSEL.

I, Walter J. Milde, counsel for The East Ohio Gas Company, do hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

Walter J. Milde,
Counsel for
The East Ohio Gas Company.

January 21, 1950.

(a) The decision misapplies *Illinois Gas Co. v. Public Service Co.*, 314 U. S. 498 (1942), as determinative of this case. The Illinois Gas Company's sole business was selling gas for resale—a wholesale operation. All of its property was devoted to that end. It had no facilities for and did not engage in local distribution. East Ohio's sole business is local distribution—a retail operation. All of its property is devoted to that end. The difference between this wholesaler and East Ohio as a retailer must necessarily be material because the Natural Gas Act expressly subjects "the wholesale distribution to public service companies of natural gas moving interstate" to Federal Power Commission jurisdiction (314 U. S. 498, 506). It just as expressly exempts retail distribution under the terms "local distribution" and "the facilities used for such distribution." We most respectfully submit that in view of the express language of Section 1(b) of the Natural Gas Act and its legislative history a prior decision of this Court that an intrastate wholesaling company, like Illinois Gas, is subject to Federal Power Commission jurisdiction should not be applied as a controlling authority to the effect that an intrastate retailing company, like East Ohio, is likewise subject to Federal Power Commission jurisdiction.

(b) The great bulk of East Ohio's property is what the decision recognizes as "local mains" which the State alone can regulate and which Section 1(b) of the Act expressly excludes from *all* provisions of the Natural Gas Act. Nevertheless the Federal Power Commission's orders here directly and expressly relate to, and accounting-wise regulate, this very property. We respectfully submit that at the very least the decision herein requires modification to restrict the general accounting and report orders of the Federal Power Commission to the portion of East Ohio's property which the decision holds is involved in "transportation" and "interstate commerce" in "East Ohio's high-pressure pipe lines." Otherwise the decision permits Fed-

eral Power Commission jurisdiction to extend to the great bulk of East Ohio's property which the opinion recognizes is clearly excluded from such jurisdiction.

(c) There is an important statement in the opinion which is not supported by the record. In discussing possible transgressions of statutory and constitutional limits the decision recites: "Nor did the Commission fail to make proper findings to support its order." The only findings made by the Commission after a hearing in this proceeding are in its order of June 25, 1946, and appear at R. 142-150. Most of these findings are as to jurisdictional aspects of the case. As to the orders now involved the sole findings are that they were duly served upon East Ohio and East Ohio did not comply.

No evidence, subject to cross examination or otherwise, was ever presented by the Federal Power Commission upon the question of the reasonable necessity of applying its general report and accounting orders as to *all* of East Ohio's property. The Commission's evidence and its findings concentrated on the issue of jurisdiction. Nor was there any judicial consideration of this question below (R. 205).

We most respectfully submit that in view of the great cost to East Ohio and its consumers of literal compliance with these general orders as to *all* of its properties, this Court should in any event remand this case for a full and fair hearing on the reasonableness and the necessity of the Federal Power Commission's general orders as applied to East Ohio's 69 city plants. We believe that upon appropriate consideration and in the light of the enormous expense involved the Federal Power Commission will determine at such hearing that it does not need accounting and original cost data on East Ohio's city plants.

Such a determination, moreover, would be consistent with and we believe ought to follow from the first part of

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 71 Original

FEDERAL POWER COMMISSION,
Petitioner,

v.

THE EAST OHIO GAS COMPANY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN SUPPORT OF PETITIONS FOR REHEARING SUBMITTED ON BEHALF OF THE STATE OF NEW MEXICO, AND NEW MEXICO PUBLIC SERVICE COMMISSION, AMICI CURIAE.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now the State of New Mexico, and New Mexico Public Service Commission, amici curiae, and present this memorandum in support of the petitions for rehearing presented by the Respondents in the above entitled cause, and, in support thereof, respectfully show:

I.

The State of New Mexico and New Mexico Public Service Commission reiterate each and every point and argument submitted in the memorandum in support of petitions for rehearing submitted in behalf of the National Association of Railroads and Utilities Commissioners, and certain state regulatory commissions, amici curiae.

II.

The State of New Mexico and New Mexico Public Service Commission, alarmed over the continuous invasion of states' rights and states' regulatory power by increasing Federal control, cannot reconcile the majority opinion with the previous opinions of the Honorable Court and the arguments as set forth in the minority opinion which are extensively quoted as follows:

1. ". . . . . Hence, the states appealed to Congress to set up machinery to fix the import price of out-of-state gas." This was all that the states asked the Federal Government to do, and it is everything that the Federal Power Commission revealed any purpose to do while the legislation was pending.

2. Quoting the Solicitor of the Federal Power Commission: "The whole purpose of this bill is to bring under federal regulation the pipe lines and to leave to the state commissions control of distributing companies and over their rates, whether that gas moves in interstate commerce or not."

3. "That is what the state authorities active in promoting the legislation seem to have believed had been accomplished."

4. "How much farther than the order here under

review the Commission will go in supplanting a duplicating state regulation is not clear from its argument, and how far it can go is rendered unclear by the Court's opinion which expressly approves some overlapping but leaves its bounds in carefully stated doubt. The anxiety which this program stirs among other states is explained by its magnitude."

5. "This is a real conflict in which experience shows state control will wither away and leave the federal rule in possession of the field."

6. "This court can sustain such overlapping and overriding of the states' authority *only* by repudiating its own recent statements."

(a) "Congress meant to create a comprehensive scheme of regulation that would be *complementary* in its operation to that of the states, without any confusion of functions." Public Utilities Comm. v. United Fuel Gas Co., 317 U. S. 456, 467.

(b) "In a later case, quoting H. R. Rep. No. 709, 75th Congress, 1st Session, we said that 'the bill was so designed to take no authority from state commissions' and was 'so drawn as to complement and in no manner usurp state regulatory authority.'" Federal Power Comm. v. Hope Natural Gas Co., 320 U. S. 591, 610.

(c) "And only last year we observed that the Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other." Federal Power Commission v. Panhandle Eastern Pipe Line Company, 337 U. S. 498, 513.

7. "The Court finds the dividing line of jurisdiction to

be drawn by physical characteristics of the transmission lines. It seizes upon the point where high pressure at which gas is transmitted any substantial distance is reduced to low pressure at which it must be served to customers' burners through the community supply lines as the outer limits of the 'local' area reserved to the states."

"It is interesting to note that the H. R. 11662 contained 'only if such distribution was from low pressure mains'. But the Natural Gas Act, as passed, eliminated 'low pressure' or any reference to pressure."

8. "The pressure reduction station now relied upon to limit 'local' had lost its standing even in tax cases and never was accepted in regulation cases."

9. "With this approach, today's decisions confine the states' regulatory power to the service area, bounded by the low-pressure transmission system, which means practically within the city gates."

10. "However, this pressure factor is one which we found immaterial in Interstate Natural Gas Co. v. Federal Power Comm., supra 689, where, with rare unanimity, we put our emphasis upon the fact of sale for resale in interstate commerce. But today it is the difference between retail and wholesale operations which is termed immaterial, so long as the factor of high-pressure pipe line is present."

11. "And we went on to say that the purpose of the legislation was to make state regulation effective 'by adding the weight of federal regulation to supplement and reinforce it in the gap created by prior decisions. . . . .'"

12. ". . . . . less than two months before the passage of the Natural Gas Act, the Court, through the pen of Mr. Chief Justice Hughes, in a case not cited by the Court, de-

clared that such transmission lines were properly within the sphere of state rate-making powers. Lone Star Gas Co. v. Texas, 304 U. S. 224."

13. "It seems to me that the obvious answer is that intrastate transmission lines, of a retail company, devoted exclusively to serving communities within the state are facilities used in the local distribution of natural gas and are accordingly excepted from application of the Act."

14. *"It's 'but' clause was Congress' assurance to the state bodies sponsoring the legislation that federal control would not extend to the area within their authority.* cf. Connecticut Light-Power Co. v. Federal Power Comm., 324 U. S. 515, 527." (Emphasis ours)

15. ". . . . . that Congress in passing this Act froze into law current judicial decisions. *It keeps faith with the States."* (Emphasis ours)

16. "Of course, this solution does not render meaningless the 'transportation of natural gas in interstate commerce.' " . . . . "it would be logical enought to give the Federal Power Commission, under above 'transportation clause,' exclusive jurisdiction over the main transmission lines of a retail gas company which ran through Ohio and on into New York; but could leave to Ohio exclusive jurisdiction over lateral lines branching out from the main trunk in Ohio, and whether one or one hundred miles long, devoted exclusively to delivering gas to the burner tips in Ohio communities."

17. "What the Power Commission asks the Court to do today is not to fill the gap in the states power to regulate, for there is none, but to create a gap in order to make room for federal power."

18. "As Mr. Justice Brandeis said, 'It is one of the

happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.' New State Ice Co. v. Liebmann, 285 U. S. 262, 311. Long before the Federal Government could be stirred to regulate utilities, courageous states took the intiative and almost the whole body of utility practice has resulted from their experiences."

19. We conclude our memorandum with this thought expressed in the dissenting opinion:

"I think that observance of good faith with the states requires that we interpret this Act as it was represented at the time they urged its enactment, as its term read, and as we have, until today, declared it, viz, *to supplement but not to supplant state regulation.* What amounts to an entrapment of the state agencies that supported this Act under the representation that it would not deprive them of powers but would only make their powers effective will probably not make it easier to get needed regulatory legislation in the future."

CONCLUSION

It is respectfully urged that the petitions for rehearing be granted and that the decree of the United States Court of Appeals for the District of Columbia be, upon further consideration, affirmed.

Respectfully submitted,

JOE L. MARTINEZ
Attorney General of New Mexico

PHILIP H. DUNLEAVY
PETER N. CHUMBRIS
Assistant Attorneys General

Feb. 10, 1950

CERTIFICATE OF COUNSEL

We, Attorneys for the State of New Mexico and New Mexico Public Service Commission, amici curiae, do hereby certify that the foregoing memorandum in support of the petitions for rehearing in this cause is presented in good faith, and not for delay.

JOE L. MARTINEZ
Attorney General of New Mexico
PHILIP H. DUNLEAVY
PETER N. CHUMBRIS
A sistant Attorneys General

In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. 71.

FEDERAL POWER COMMISSION,
Petitioner,

v.

THE EAST OHIO GAS COMPANY, ET AL,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

MEMORANDUM IN SUPPORT OF PETITIONS FOR REHEARING SUBMITTED ON BEHALF OF THE ARIZONA CORPORATION COMMISSION, STATE OF ARIZONA, AMICUS CURIAE.

FRED O. WILSON,
Attorney General of Arizona,

PERRY M. LING,
Chief Assistant Attorney General,
Attorneys for Said Commission,
108 Capitol Building,
Phoenix, Arizona.

February , 1950.

In the Supreme Court of the United States

OCTOBER TERM, 1949.

No. 71.

FEDERAL POWER COMMISSION,
Petitioner,

v.

THE EAST OHIO GAS COMPANY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

MEMORANDUM IN SUPPORT OF PETITIONS FOR REHEARING SUBMITTED ON BEHALF OF THE ARIZONA CORPORATION COMMISSION, STATE OF ARIZONA, AMICUS CURIAE.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now the Arizona Corporation Commission, amicus curiae, by and through the Attorney General of the State of Arizona, and presents this memorandum in support of the petitions of the respondents for a

rehearing in the above entitled cause and as reasons thereof, respectfully represents:

1. The Arizona Corporation Commission, which is the State regulatory agency entrusted with the authority to control and regulate all State utility corporations operating in Arizona, has become greatly concerned over the far-reaching effect of the majority decision in this cause, which has or may in the future have the effect of rendering wholly ineffective present and future State commission regulations. Said Commission has therefore requested the Attorney General of Arizona to specifically present a request for a rehearing and reconsideration of this cause.

2. In discussing the Natural Gas Act and as a basis for the majority decision, the following statement is made:

> "But what Congress must have meant by 'facilities' for 'local distribution' was equipment for distributing gas among consumers within a particular local community, not the high pressure pipe lines transporting the gas to the local mains."

After reviewing a number of cases decided prior to the enactment of the Natural Gas Act, the Court continues:

> "Under these decisions state regulatory powers could not reach high-pressure trunk lines and sales for re-sale."

Based upon this premise and the conclusions that East Ohio is a "natural gas company" and that "transportation of natural gas in interstate commerce" is subject to regulation by the Commission, the Court concludes that the regulations proposed by the Commission are permissible, even though the State agency "would have equivalent authority."

The majority has thus turned its back upon recent decisions of this Court, and particularly *Panhandle Eastern Pipeline Company v. Public Service Commission*, 332 U. S. 507, 513, wherein in a unanimous opinion in December, 1947, this statement appears:

> "Variations in main pressures are not the criterion of the state's regulatory powers under the commerce clause."

Accordingly, we now have established the principle of the case last cited that the regulatory power of the states has no relation to main pressures, while the instant case bases the regulatory jurisdiction of the Federal Power Commission on main pressures, even to the point where it is said that the state and federal regulatory bodies have "equivalent authority."

That such a result was not intended by Congress in enacting the Natural Gas Act is amply established by the history of the Act. All who are conversant with the history of the Act are agreed upon the proposition that Congress, in passing the Act, had no intention of supplanting state jurisdiction wherever it existed; and we

submit that it is not sound nor logical to now speculate into existence a congressional intention to supplant state jurisdiction where such jurisdiction may have been, at the time of the enactment of the Natural Gas Act, not finally settled judicially or subject to some question. The assurance given the states by Congress, at the time the Natural Gas Act came into being, that state jurisdiction would not be supplanted or circumscribed should not now, in good conscience, be diluted into an assurance of state jurisdiction if, and only if, such jurisdiction was without question in 1938.

If this policy is followed in the future, the result will be gradual supplanting of state regulations by those of the Federal Commission, of this there can be no doubt. Nor can there be any doubt that in the event of a conflict in the two authorities, those of the Federal Commission would be found to be superior.

At most, under the "pressure" formula, as now adopted, the states are permitted to regulate only inside the local areas, and because the scope of the reduction in pressure is not definitely defined, it is assumed the Federal Power Commission will take unto itself all authority which can be reasonably found to exist, as the result of this decision. The states would thus retain jurisdiction to fix rates for local consumers, but little else.

Here East Ohio takes the gas upon delivery to it by the producing and transporting companies. At that

point, inside the State of Ohio, it becomes the property of the East Ohio Company. The gas has thereupon been delivered in Ohio to the consignee, who may sell it at that point or may move it on to some more convenient place in the state for delivery to its customers. In either event when it is sold to East Ohio for resale, its future sale at retail is a local activity, which if taking place at the point of delivery would without question be considered as subject to the sole regulation of state authorities. Federal regulation is allowed only because East Ohio is unable to dispose of the gas immediately, but must move it elsewhere for delivery to the ultimate consumers. It is this transportation for delivery which is made the subject of Federal control, and as being outside the scope of "facilities" for "local distribution," subject to state regulation.

We are at loss to understand how East Ohio's lines used by it to distribute this gas to consumers are determined to be "high pressure lines transporting gas to local mains" so as to be subject to Federal regulation and at the same time "the state agency establishing (such) a rate would have equivalent authority." There can be no denial of the state's power to fix rates for sale of gas to ultimate consumers, and for this purpose to exercise some supervision over the high pressure lines, but this can only be, because such lines are used in "local distribution." Lines which are "high pressure" for the purpose of Federal regulation become "local distribution" lines for the purpose of state control.

CONCLUSION:

It is respectfully urged that the petitions for rehearing be granted and that the decree of the United States Court of Appeals for the District of Columbia Circuit be, upon further consideration, affirmed.

Respectfully submitted,

FRED O. WILSON,
Attorney General of Arizona,

PERRY M. LING,
Chief Assistant Attorney General of Arizona,
Attorneys for Arizona Corporation Commission.

CERTIFICATE OF COUNSEL.

We, attorneys for the Arizona Corporation Commission, State of Arizona, *amicus curiae*, do hereby certify that the foregoing memorandum in support of the petitions for rehearing in this cause is presented in good faith, and not for delay.

FRED O. WILSON,
Attorney General of Arizona,

PERRY M. LING,
Chief Assistant Attorney General,
Attorneys for Said Commission.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

No. 71

FEDERAL POWER COMMISSION,
Petitioner

v.

EAST OHIO GAS COMPANY, ET AL,
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ADOPTION BY RAILROAD COMMISSION OF TEXAS OF AMICUS MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING FILED BY THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

PRICE DANIEL
Attorney General of Texas

CHARLES D. MATHEWS
Executive Assistant
Attorney General

Attorneys for Railroad Commission
of Texas

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

No. 71

FEDERAL POWER COMMISSION,
Petitioner

v.

EAST OHIO GAS COMPANY, ET AL,
Respondents

ON WRIT OF CERTIORARI TO
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FOR THE DISTRICT OF COLUMBIA

ADOPTION BY RAILROAD COMMISSION OF TEXAS
OF AMICUS MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING FILED BY
THE NATIONAL ASSOCIATION OF RAILROAD
AND UTILITIES COMMISSIONERS

TO THE HONORABLE, THE SUPREME COURT OF THE
UNITED STATES:

Comes now the Railroad Commission of Texas by and through Price Daniel, Attorney General of Texas, and adopt

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

No. 71

FEDERAL POWER COMMISSION,
Petitioner

v.

EAST OHIO GAS COMPANY, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ADOPTION BY RAILROAD COMMISSION OF TEXAS
OF AMICUS MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING FILED BY
THE NATIONAL ASSOCIATION OF RAILROAD
AND UTILITIES COMMISSIONERS

TO THE HONORABLE, THE SUPREME COURT OF THE
UNITED STATES:

Comes now the Railroad Commission of Texas

through Price Daniel, Attorney General of Texas, and

as its own the Amicus Memorandum in support of the petition for rehearing filed by the National Association of Railroad and Utilities Commissioners in this cause.

Respectfully submitted,

PRICE DANIEL
Attorney General of Texas

Charles D. Mathews

CHARLES D. MATHEWS
Executive Assistant
Attorney General

Dated February 8, 1950

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NO. 71.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

FEDERAL POWER COMMISSION, *Petitioner*

v.

THE EAST OHIO GAS COMPANY, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals
For the District of Columbia Circuit.

MEMORANDUM IN SUPPORT OF PETITIONS FOR REHEARING SUBMITTED ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AND CERTAIN STATE REGULATORY COMMISSIONS, AMICI CURIAE.

WALLACE E. WARNER,
Attorney General.

P. O. SATHRE,
Ass't Attorney General.

RICHARD P. GALLAGHER,
Commerce Counsel,
Public Service Commission

State Capitol
Bismarck, North Dakota.

Attorneys for the State of North Dakota.

January 31, 1950.

[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

NO. 71.

FEDERAL POWER COMMISSION, *Petitioner*

v.

THE EAST OHIO GAS COMPANY, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit.

MEMORANDUM IN SUPPORT OF PETITIONS FOR REHEARING SUBMITTED ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AND CERTAIN STATE REGULATORY COMMISSIONS, AMICI CURIAE.

To the Honorable Supreme Court of the United States:

Comes now the State of North Dakota, *Amicus Curiae*, and presents this memorandum for consideration in the request that a rehearing be granted the respondents in the above-entitled cause, which, in support thereof, the State of North Dakota respectfully shows:

1. That the State of North Dakota since 1919, and prior thereto has had and now has a comprehensive body of law regulating public utilities including natural-gas companies.

That the State of North Dakota, through its Public Service Commission and predecessor agencies, has been active in regulating these Public Utilities and its power so to do has been on numerous occasions sustained by the Supreme Court of the State of North Dakota.

That under its regulatory laws governing public utilities, the State of North Dakota, has been successful in protecting the interests of the people of this State, and by such local control has been able to secure adequate and efficient service from the utilities operating in the State at a minimum of cost to the public.

2. The State of North Dakota is deeply concerned with the broad powers vested in the Federal Power Commission by the decision in this cause. We feel that the decision goes beyond the clearly expressed purpose of the law and will lead to further confusion in the administration of State laws, with the ultimate loss of all local and State control which, we feel, the law meant to preserve.

3. We feel that the Natural Gas Act intended that the jurisdiction of the Federal Power Commission should be predicated on the answers to the questions:

(1) Are the activities of the company to be regulated of national or of local importance, and (2) Is the company to be regulated a supplier (wholesaler) or a retailer (distributor)?

The majority opinion states:

> ". . . But prior constitutional decisions, not what we have since decided or would decide today, form

the measure of the gap which Congress intended to close by this Act." (citing)

"In a series of cases repeatedly called to the attention of the House Committee, this Court had declared that the states could regulate interstate gas only after it was reduced in pressure and entered a local distribution system. Public Utilities Comm'n v. Landon, 249 U.S. 236, 243; Missouri v. Kansas Gas Co., 265 U.S. 298, 310; Public Utilities Comm'n v. Attleboro Co., 273 U.S. 83, 89; and see East Ohio Gas Co. v. Tax Comm'n. 283 U. S. 465, 470-472. Under these decisions state regulatory power could not reach high-pressure trunk lines and sales for resale. This was the "gap" which Congress intended to close . . . ."

Examination of these "prior constitutional decisions" that "form the measure of the gap which Congress intended to close" indicates clearly that the activities of East Ohio are not included in that hiatus. In each case cited by the majority opinion, the question turned on whether the state was attempting to regulate the rate of a supplier (wholesaler) or whether the state was attempting to regulate the rate of a retailer (distributing company). If the rate was that of a supplier (wholesaler) it was held that the matter was of national concern and not of local concern, whereas if the rate was that of a retailer (distributing company) it was held that the matter was one of local concern and the state could exercise its regulatory powers. In none of the cases above cited did the question turn on whether the gas was moving in a "high-pressure trunk line" or had been stepped-down. On the contrary it held that no gap existed once the transfer was made from the supplier (wholesaler) to the retailer (local distributing company). As said by the court in the Kansas Gas Case, P. 308:

" . . . . With the delivery of the gas to the distributing companies, however, the interstate movement

> ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation." (citing the Landon Case)

and further on page 309 it said:

> ". . . . The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made *by the transporting company or by the independent distributing companies." In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance."* (Italics ours)

Briefly reviewing the four cases cited by the majority to indicate the gap that existed prior to the Act, shows that in the Landon case a supplier (wholesale) rate was in dispute and it was held that a state could not act; the Kansas Gas case involved a supplier's (wholesaler's) rate, the court held that gas was in interstate commerce up *to* the time it passed to the local distributing company, therefore the state could not regulate the wholesale rate; in the Attleboro case the Court held that a state could not regulate wholesale rates; the East Ohio Gas Co. v. Tax Comm's Case concerned a tax matter and no utility regulatory measure was involved.

4. We are concerned about the decision in this case, because, though presently it only requires East Ohio to conform to the Commission's system of accounts, still it is the natural inference, under the "pressure theory" applied by the majority, that the Federal Power Commission can set the rate on the gas moving through the distributing company's (East Ohio) high-pressure trunk lines to the city gates. The only

rate-making authority that would be left to the state would be within the limits of the various cities. Needless to say such a situation not only leads to further confusion but would make it well nigh impossible for a state to set up a uniform rate which is highly desirable from a local point of view.

If the Commission only desires that East Ohio set up its books in accordance with the Commission's rules so that the Commission examine them without asserting its rate making authority—then it is an expensive burden that the Commission seeks to have imposed upon the gas consumers in Ohio and the consumers in other states in which the commission seeks to assert a similar control.

Conclusion

It is respectfully urged that the petitions for rehearing be granted and that upon reconsideration the decree of the United States Court of Appeals for the District of Columbia Circuit be affirmed.

Respectfully submitted,

WALLACE E. WARNER,
Attorney General

P. O. SATHRE,
Ass't Attorney General

RICHARD P. GALLAGHER,
Commerce Counsel,

Public Service Commission

State Capitol
Bismarck, North Dakota

Attorneys for the State of North Dakota.

Certificate of Counsel

We, the undersigned attorneys for the State of North Dakota, *amicus curiae,* do hereby certify that the foregoing memorandum in support of the petitions for rehearing in this cause is presented in good faith and not for the purpose of delay.

WALLACE E. WARNER,
Attorney General

P. O. SATHRE,
Ass't Attorney General

RICHARD P. GALLAGHER,
Commerce Counsel,

Public Service Commission

State Capitol
Bismarck, North Dakota

Attorneys for the State of North Dakota.

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TRADE

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